No. 3791

United States
Circuit Court of Appeals
For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,
Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners,
Appellees.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,
Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,
Appellees.

Brief of Appellant, The Equitable Trust Company of New York.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

MURRAY, PRENTICE & HOWLAND,
Residence: New York, N. Y.;
RICHARDS & HAGA,
J. L. EBERLE,
Residence: Boise, Idaho;
Solicitors for the Equitable Trust Company of New York.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE 40867

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Appellees.

Brief of Appellant, The Equitable Trust Company of New York.

Upon Appeal From the United States District Court for the District of Idaho, Southern Division.

STATEMENT OF THE CASE.

Appellant, The Equitable Trust Company of New York, has appealed from certain portions of the decree of foreclosure, decreeing and adjudging the lien

of its mortgage subject and subordinate to the claims of certain unsecured general creditors as to certain personal property of the mortgagor, Great Shoshone and Twin Falls Water Power Company, in the possession of the Receiver of that company appointed in a general creditors' suit, and which decree ordered the claims of such unsecured general creditors to be paid in full out of the proceeds from the sale of such property to the exclusion of all other general creditors.

This appellant has also appealed from an order made after sale under the foreclosure decree, directing the Special Master to pay in full out of the proceeds from the sale of such personal property the claims of such unsecured general creditors to the exclusion, as aforesaid, of other general creditors and the claim of appellant under its deficiency.

On November 2, 1914, the defendant Guy I. Towle, a creditor of the Great Shoshone and Twin Falls Water Power Company (hereinafter called the Power Company), commenced a suit in the United States District Court for the District of Idaho, Southern Division, against said Company for the appointment of a Receiver. The bill was in the nature of a general creditors' bill, setting forth the insolvency of the Power Company, its inability to meet its obligations, and that unless the Court took into judicial custody and administered the property of the Company for the protection of the rights of the complainant in that suit and other creditors of the Power Company there was great danger that the properties of the

defendant might not be operated as a continuous system and enterprise, and that a vast and unnecessary multiplicity of suits would result, and that irreparable injury, damage and loss would be caused to all the creditors and to the public (Rec. 164 to 166), and prayed the Court that the rights of the complainant and of all other creditors of the defendant might be ascertained and decreed, and that the Court fully administer the property and funds of the Company and marshal all the assets and ascertain the several and respective liens and priorities existing thereon and enforce and decree the rights, liens and equities of the creditors as the same might be finally ascertained by the Court. (Rec., 167 to 170.)

Thereafter, on November 2, 1914, the Court appointed the appellee William T. Wallace, hereinafter called the Receiver, as receiver of all properties of said Power Company, to hold, manage and operate the same for the protection and preservation of the respective rights and equities of all parties interested therein. (Rec. 170.) The Receiver took immediate possession of all the property, rights and franchises of the Power Company and continued in possession thereof until after the confirmation of sale on February 16, 1916.

On April 14, 1914, the appellant, The Equitable Trust Company of New York, hereinafter sometimes called the Trustee, commenced an independent suit in the same Court against the Great Shoshone and Twin Falls Water Power Company, William T. Wallace as Receiver of said Company, Guy I. Towle

(plaintiff in the general creditors' suit in which the Receiver had been appointed), and Carl J. Hahn, administrator of the estate of Harry M. King, deceased, for the foreclosure of a mortgage or deed of trust executed by the Power Company under date of May 1, 1910, and certain supplemental mortgages dated June 21, 1911, and April 7, 1913, respectively, alleging default in the payment of interest and seeking foreclosure to enforce the payment of such interest. Thereafter the principal was declared due for failure to pay the interest within the period of grace provided in the trust deed, and on September 16, 1915, a supplemental bill was filed seeking foreclosure as to both principal and interest. The bill and supplemental bill showed there was outstanding an issue of bonds of the par value of $2,230,000, with interest from May 1, 1914, secured by a trust deed expressly covering all property of the Power Company, real, personal and mixed, and the income and earnings thereof. (Rec., 44, 45, 62, 63, 79.) The defendant Carl J. Hahn filed answer on May 15, 1915, setting up a judgment acquired against the Power Company on September 23, 1914 (Rec., 88-101). To this answer a reply was filed by the Trustee on October 2, 1915 (Rec., 101).

The cause was set for trial Monday, October 25, 1915, none of the defendants having filed an answer in the cause except the defendant Hahn. On October 16, L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, having previously filed their claim for allowance in the general

creditors' suit, presented their claim to the Judge at Chambers, *ex parte*, and obtained the allowance or approval thereof in the general creditors' suit; and on Saturday, October 23rd, they presented to the Judge at Chambers a petition for leave to intervene in the foreclosure suit (Rec., 107) for the purpose of attacking the validity of the mortgage as a mortgage on personal property. An order permitting them to intervene was entered (Rec., 111) and they immediately filed their answer to the bill of complaint in the foreclosure suit (Rec., 111). The defendant Guy I. Towle on Saturday, October 23rd, *ex parte*, before the Judge at Chambers obtained the allowance or approval of his claim in the general creditors' suit, and thereupon and on the same day he filed his answer to the bill of complaint in the foreclosure suit, setting forth substantially the same facts and making the same contentions as the interveners Plumer and Scull (Rec., 102).

Complainant on October 25, 1915, moved to vacate the order permitting said interveners to intervene and to dismiss their petition in intervention and to strike their answer, for the reason that they did not have such interest in the litigation as would entitle them to intervene and be made parties defendant in the foreclosure suit (Rec., 130). A motion to strike the answer of the defendant Guy I. Towle was likewise filed by complainant on October 25th (Rec., 106). The appellee Jake M. Shank on October 25th, in the same manner as set forth above, obtained the allowance of his claim in the general creditors' suit,

by the Judge at Chambers, and obtained leave to intervene in the foreclosure suit (Rec., 130), and on the same date filed his answer in said foreclosure suit, similar in all respects to the answers previously filed by Plumer and Scull; and complainant on October 26th moved to vacate and set aside the order permitting Shank to intervene and to dismiss his petition in intervention and to strike his alleged answer, for the reason that he did not have such interest in the litigation involved in the foreclosure suit as to entitle him to intervene or be made a party defendant therein (Rec., 131-140).

The motions of the Trustee to vacate the order permitting the interveners to intervene and to strike the answers of said interveners and of defendant Guy I. Towle were overruled by the Court, and the cause came on for trial upon the bill of complaint and supplemental bill and amended bill, and the answers referred to and the answer of the Receiver (Rec., 81). On October 27, 1915, during the trial of the cause, the defendant Power Company lodged its answer admitting all the allegations of the bill and supplemental bill. During the trial the interveners Jake M. Shank, L. M. Plumer and E. B. Scull, and the defendants Carl J. Hahn, Guy I. Towle, and the Receiver of the Power Company, made the same objections relative to the recordation and execution of the deed of trust and supplemental mortgages, and denied that the Trustee had a prior lien on certain personal property of the Power Company. (Rec., 181, 182.)

On November 17, 1915, the Court rendered its decision, holding in substance that the general creditors who had obtained the allowance of their claims in the general creditors' suit, and who had appeared in the foreclosure suit, had such an interest in the personal property subject to the lien of the mortgage that they could contest the validity thereof, and that the lien of such general creditors whose claims had been thus allowed was superior to that of the Trustee upon certain articles of personalty; and on December 6, 1915, a decree was entered wherein it was ordered that the interveners mentioned above and the defendants Towle and Hahn, to the exclusion of all other creditors of the Power Company, should be paid in full out of the proceeds from the sale of the personal property upon which the Court had held that the lien of such general creditors was superior to the lien of the Trustee; and it was directed that the proceeds of such personal property should be placed by the Special Master in a fund denominated as the "Unsecured Creditors' Fund", and paid out and disbursed as aforesaid. (Rec., 191-192, 205-206.)

Prior to the entering of the decree, it was stipulated and agreed by and between all parties that in view of the decision of the Court and in view of the fact that it was to the interest of all parties, the property of the Power Company should be sold as an entirety and without delay; that the decree should provide for the sale of such property as an entirety, but that such sale should not be construed as a waiver of the right of appeal of any party to the cause as

to any matter relating to the distribution of the proceeds of sale, or as to any matter involved in the decision of the Court, but that all objections that might be raised on an appeal from the decree might be raised with the same force and effect on an appeal taken after the sale of such property under said decree (Rec., 187, 188). The property was thereafter sold by a Special Master appointed by the Court for that purpose, and the sale was duly confirmed on February 16, 1916 (Rec., 215). Prior to the sale and on December 24, 1915, all the parties to the foreclosure suit stipulated and agreed, in order to avoid the necessity of a hearing for the purpose of apportioning the proceeds of the sale as provided in paragraph 14 of the decree, that the personal property upon which the Court had decreed a prior lien in favor of certain general creditors as aforesaid was of the reasonable value of $45,000, and that in apportioning the proceeds derived from the sale of the property of the Power Company the said sum of $45,000 should be placed in what is called in the decree the "Unsecured Creditors' Fund", providing, however, that nothing contained in the stipulation should be construed as a waiver of any right by any of the parties to except or object to or appeal from any of the provisions of said decree of foreclosure or any order thereafter based upon or made pursuant to said decree (Rec., 211).

Thereafter and on February 22, 1916, the said Jake M. Shank, Guy I. Towle, Carl J. Hahn, Jake M. Shank and L. M. Plumer and E. B. Scull peti-

tioned the Court for an order directing the Special Master appointed in the foreclosure suit to pay in full the claims of said general creditors (Rec., 224), and on March 1, 1916, the Court ordered the Special Master to pay the claims of said petitioning creditors in full with interest thereon from the date of the decree in the foreclosure suit (Rec., 240). The Court denied the right of the Receiver, as the representative of all creditors of the Power Company, to make the contest made by the particular creditors above named, but held that the general creditors who had been allowed to intervene in the foreclosure suit had, by virtue of the general creditors' suit and the filing of their claims in that suit, obtained a sufficient interest in the property covered by the mortgage to entitle them to contest the priority of the lien thereof, and a status superior to that of the Receiver who was in possession of the property as the representative of all creditors. The effect of the Court's ruling was to convert a general creditors' suit wherein equality and pro rata distribution as between creditors obtained, into a contrivance by which certain creditors could obtain a preference and priority over the Receiver and all other creditors.

The contention of the Trustee, complainant in the foreclosure suit, was (1) that under the laws of the State of Idaho as construed by its highest Court, a general creditor did not have such an interest in the property of the mortgagor that he could contest the lien of a chattel mortgage which was valid between the parties and to which objection could be

made only on the ground that it had not been filed so as to give notice to subsequent purchasers or encumbrancers; and (2) that if the mortgage was subject to attack for the reasons stated above, the contest should be made by the Receiver as the representative of all creditors, and the property, or the proceeds thereof, should be turned over to the Receiver in the general creditors' suit for equitable and pro rata distribution among all creditors. In the latter event, the Trustee would be entitled to its share of the proceeds, based on its deficiency; whereas, in the case at bar, the claims of the favored creditors aggregate sufficient to take all the proceeds of the property upon which the Court held the Trustee did not have a prior lien under its mortgage.

The following facts are not in dispute:

(1) Prior to the appointment of William T. Wallace as Receiver of the Power Company on November 2, 1914, neither the interveners Jake M. Shank, L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, nor the defendants Guy I. Towle or Carl J. Hahn as administrator of the estate of Harry M. King, deceased, had acquired any lien, by process or otherwise, upon the personal property of the defendant Power Company involved in this appeal.

(2) That all parties to this cause, excepting, of course, the Power Company and its Receiver, have filed their claims with the Receiver in the general creditors' suit commenced by Guy I. Towle.

(3) That, by the terms of the mortgage or deed

of trust and supplemental mortgages foreclosed by the Trustee, all the property of the Power Company was expressly made subject to the lien of such mortgage or deed of trust, and that said instruments were executed as required by the laws of the State of Idaho relative to mortgages on real property, and were filed for record and recorded in the mortgage records of the several counties where property of the Power Company was situated, but said mortgages were not filed as chattel mortgages.

(4) That the Power Company is wholly insolvent and that the general creditors who are wholly dependent upon the dividends that will be paid in the general creditors' suit, will receive only a very small per cent of the amount due them.

ASSIGNMENT OF ERRORS.

The errors relied upon are set forth in considerable detail in the record (pp. 250-255). Stated generally, they are:

1. That the Court erred in decreeing that the lien of appellant's mortgage was subject and subordinate to the claims of general creditors as to certain personal property.

2. That the Court erred in holding that the defendants Guy I. Towle and Carl J. Hahn and the interveners L. M. Plumer, E. B. Scull and Jake M. Shank were entitled to contest the dignity or priority of the lien created by appellant's mortgage.

3. That the Court erred in giving the defendants Towle and Hahn, and the interveners Plumer, Scull

and Shank, a prior lien and claim upon certain personal property of the Power Company and in directing that the claims of said defendants and interveners be paid in full out of the proceeds from such property to the exclusion of all other creditors of the Power Company, including appellant as a creditor on account of its deficiency.

4. That the Court erred in not holding that if the mortgages of appellant were not valid liens against certain personal property of the Power Company, such property, or the proceeds thereof, should be turned over to the Receiver of the Company for distribution and administration in the general creditors' suit equitably between complainant and all other creditors of the Power Company.

5. That the Court erred in permitting the said interveners to intervene in the foreclosure suit, and in denying the motion of appellant to strike out the answers of said interveners and the answer of the defendant Towle.

6. That the Court erred in not giving appellant a first and prior lien upon all the property of the Power Company, as prayed for in its bill of complaint.

POINTS AND AUTHORITIES.

(1) The District Court erred in holding that the appointment of a Receiver in a general creditors' suit operated to give to creditors filing their claims with such Receiver a lien upon the property of the debtor. In such cases the rule is that the appoint-

ment of a chancery Receiver in the Federal Courts in the absence of specific state decisions or statutory provisions giving special powers and rights in property to the Receiver, and where he is not appointed for the special purpose of impounding or levying upon certain specific property for the benefit of a certain person or class, does not change, add to, or detract from the title or determine the rights of any litigant party; and although it cuts off the right to acquire liens, it imposes none by virtue thereof but protects and preserves all rights and interests as of the date of the appointment of the Receiver.

Pomeroy, Eq. Juris., vol. 4, 1336.

High on Receivers, sec. 5, p. 12.

Beach on Receivers, sec. 252.

Glenn, Creditors' Rights and Remedies, secs. 324-326.

Thompson, Corporations (2nd ed.), S. 6396.

Central Trust Co., etc., v. Worcester Cycle Mfg. Co., 93 Fed. 712; 35 C. C. A. 547.

Meyer v. Western Car Co., 102 U. S. 1, 26 L. ed. 59.

Commonwealth Roofing Co. v. North American, etc., Co., 135 Fed. 984; 68 C. C. A. 418.

Central Appalachian Co. v. Buchanan, 90 Fed. 454; 33 C. C. A. 107.

Schaffer v. McCulloch, 192 Fed. 801; 113 C. C. A. 535.

Quincy, Mo. & Pac. Ry. Co. v. Humphreys, 145 U. S. 582; 12 Sup. Ct. 787; 36 L. ed. 632.

N. Y., P. & O. R. Co. v. N. Y., L. E. & W. R. Co., 58 Fed. 268.

Mercantile Trust Co. vs. Southern States, etc., Co., 86 Fed. 711; 30 C. C. A. 349.

Atlantic Trust Co. v. Dana, 128 Fed. 209; 62 C. C. A. 657.

Clark v. Bacorn, 116 Fed. 617; 54 C. C. A. 73.

Fosdick v. Schall, 99 U. S. 235, 251; 25 L. ed. 339.

Savings and Trust Co. of Cleveland v. Bear Valley Irri. Co., 93 Fed. 339.

Wiswall v. Sampson, 14 How. 52; 14 L. ed. 322.

Booth v. Clark, 17 How. 322; 15 L. ed. 164.

Chicago Union Bank v. Kansas City Bank, 136 U. S. 223; 10 Sup. Ct. 1013.

Kneeland v. American Loan and Trust Co., 136 U. S. 89; 10 Sup. Ct. 950; 34 L. ed. 379.

Hollins v. Brierfield Coal and Iron Co., 150 U. S. 371; 14 Sup. Ct. 127.

Richmond v. Irons, 121 U. S. 27; 7 Sup. Ct. 788.

Ames v. U. P. Ry. Co., 60 Fed. 966, 969; 74 Fed. 335; 20 C. C. A. 432.

Woodland v. Wise, 112 Md. 35; 76 Atl. 502.

National State Bank v. Vigo County National Bank, 141 Ind. 352; 40 N. E. 799.

Polk v. Johnson, (Ind.) 76 N. E. 634.

City Bank of Wheeling v. Bryan, (W. Va.) 86 S. E. 8.

Pacific Ry. Co. v. Wade, 91 Cal. 449; 27 Pac. 769.

Garniss v. Superior Court of San Francisco, 88 Cal. 413; 26 Pac. 351.

William Von Roun v. Superior Court of San Francisco, 58 Cal. 358.

Cramer v. Iler, 63 Kansas 579; 66 Pac. 617.

Sumner Iron Works v. Wolten, 61 Wash. 689; 112 Pac. 1108.

Ardmore Natl. Bank v. Briggs Machinery Co., 20 Okla. 427; 94 Pac. 533; 23 L. R. A. (N. S.) 1074.

(2) Where the decisions or statutes of any state give to a Receiver or assignee certain specific powers or rights in property, the Federal Court will follow such decisions and statutes as to the relation which such Receiver or assignee bears to such property.

Hamilton v. David C. Briggs Co., 179 Fed. 949.

Dolle v. Cassell, 135 Fed. 52; 67 C. C. A. 526.

Bucher v. Cheshire R. R. Co., 125 U. S. 555; 8 Sup. Ct. 974.

Etheridge v. Sperry, 139 U. S. 276, 277; 11 Sup. Ct. 569.

Union Bank v. Kansas City Bank, 136 U. S. 223; 10 Sup. Ct. 1013.

(3) In Idaho a chattel mortgage, unrecorded and unaccompanied by the affidavit of good faith required by sec. 3408, Idaho Revised Codes, is valid as to the parties and as to all creditors, excepting those having a lien upon the property by attachment or some process, and there are neither statutory provisions

nor decisions in the State of Idaho giving either a Receiver representing general creditors or such general creditors by virtue of the appointment of a Receiver a lien sufficient to contest such chattel mortgage.

Sec. 3408, Rev. Codes of Idaho.

Neustadter Bros. v. Doust, 13 Ida. 617; 92 Pac. 978.

Ryan v. Rogers, 14 Ida. 304; 94 Pac. 427.

Martin v. Holloway, 16 Ida. 513; 102 Pac. 3.

(4) Under sec. 3396, Rev. Stats. of Idaho, a simple contract creditor who in no way connects himself with an interest in the property by lien or attachment, is not such an interested party as to be entitled to intervene in a foreclosure suit.

Neustadter v. Doust, 13 Ida. 617; 92 Pac. 978.

Ryan v. Rogers, 14 Ida. 309; 94 Pac. 427.

Martin v. Halloway, 16 Ida. 513; 102 Pac. 3.

Horn v. Volcano Water Co., 13 Cal. 63; 73 Am. Dec. 569 and note.

Tompson v. Huron Lumber Co., 4 Wash. 600; 30 Pac. 741.

Brown v. Saul, 16 Am. Dec. 175 and note; 4 Martin N. S. (La.), 434.

La Croix v. Menard, 15 Am. Dec. 161 and note; 3 Martin N. S. 339.

Clapp & Co. v. Phillips & Co., 19 La. Annual 461; 92 Am. Dec. 545.

Kansas C. P. Ry. Co. v. Fitzgerald (Neb.), 49 N. W. 1100.

Bray v. Booker, 6 N. D. 526; 72 N. W. 933.

Smith v. Geo. T. Smith Mfg. Co., (Mich.), 77 N. W. 308.
Yetzer v. Young, 3 N. D. 263; 52 N. W. 1054.
Murray v. American Surety Co., 70 Fed. 341; 17 C. C. A. 138.
Pomeroy, Rem. & Rem. Rights, sec. 430.
Smith v. Gale, 144 U. S. 518; 12 Sup. Ct. 674.
Sands v. Greeley & Co., 80 Fed. 195.

(5) The Receiver, and not the general creditors, is the proper party to a suit involving general assets in his possession, and where such assets are held not to be subject to any lien existing at the time of his appointment, he is entitled to retain them for equitable distribution.

High on Receivers, sec. 200.
Stewart v. Hayden, 72 Fed. 402.
Beach, Receivers, secs. 439 to 443.
Thompson, Corporations, 2nd ed., vol. 5, sec. 6396.
Atlantic Trust Co. v. Dana, 128 Fed. 209; 62 C. C. A. 657.
Porter v. Sabin, 149 U. S. 473, 478; 13 Sup. Ct. 1008.
Doggett v. Railroad Co., 99 U. S. 72, 78; 25 L. ed. 319.
Express Co. v. Railroad, 99 U. S. 191, 199; 25 L. ed. 319.
Gray v. Davis, 10 Fed. Cas. 1006, 1009.
Davis v. Gray, 16 Wall. 203, 217, 219; 21 L. ed. 447.

Ames v. Union Pacific Ry. Co., 74 Fed. 335; 20 C. C. A. 432.

Jones, Railroad Securities, sec. 495.

Jones, Corporate Bonds and Mortgages, 479, 480.

Werner v. Murphy, 60 F. 769.

Calvert, Parties in Equity, pp. 20 and 21.

Bank v. Peters, 44 Fed. 13.

Hayden v. Thompson, 71 Fed. 60; 17 C. C. A. 592.

Bailey v. Mosher, 63 Fed. 488, 491; 11 C. C. A. 304.

Honor v. Henning, 93 U. S. 228; 23 L. ed. 879.

(6) Where the purpose and object of a suit is for the appointment of a chancery Receiver to marshal the assets and hold and manage the same for the preservation and protection of every interest therein, no one creditor or class can, by virtue of the appointment of such Receiver, acquire a right to defeat any other creditor or class unless such right existed prior to the appointment of the Receiver.

Haehnlen v. Drayton, 192 Fed. 300; 112 C. C. A. 558.

Sage v. Memphis & L. R. R. R. Co., 125 U. S. 361; 8 Sup. Ct. 887; 31 L. ed. 694.

Seibert v. Minn. & St. L. Ry. Co., 52 Minn. 246; 53 N. W. 115.

Union Trust Co. v. Illinois Midland Ry. Co., et al., 117 U. S. 434; 6 Sup. Ct. 809; 29 L. ed. 963.

Hancock v. Wooten, 107 N. C. 9; 12 S. E. 199; 11 L. R. A. 466.

Westinghouse Elec. & Mfg. Co. v. Idaho Railway, L. & P. Co., 228 Fed. 972.

(7) In such cases the rule is the same as the rule that formerly obtained in bankruptcy proceedings.

Under the National Bankruptcy Act, prior to the amendment of 1910 giving the trustee special rights and powers, the trustee acquired no such lien by the sequestration of the property of the debtor for the benefit of the creditors as to enable him to attack a mortgage, in the absence of actual fraud, unless he did so representing a creditor who had such a right, prior to the appointment of the trustee.

In re Economical Printing Co., 110 Fed. 514; 49 C. C. A. 133.

In re Collins, Fed. Cas. 3007.

York Mfg. Co. v. Cassell, 201 U. S. 353; 50 L. ed. 785.

In re Lane Lumber Co., 210 Fed. 82; affirmed 217, f. 550.

(8) Such was also the rule under the acts of June 3, 1864, and June 30, 1876, providing for Receivers of insolvent national banks and the sequestration of the property and assets thereof for the redemption of circulating notes and the payment of the debts of the creditors. Under these acts the appointment of a Receiver in no way affected the right of any creditor or class, and the rights and equities of

all parties were fixed as of the date of the appointment of the Receiver.

Chemical National Bank v. Armstrong, 59 Fed. 372; 8 C. C. A. 155.

Commercial and Savings Bank v. Robert H. Jenks Lbr. Co., 194 Fed. 739.

(9) A secured creditor, such as the trustee in the case at bar, should in any event be permitted to share in the general assets of the insolvent debtor, at least to the extent of its deficiency.

Mercantile Trust Co. v. Southern States Land and Timber Co., 86 Fed. 711; 30 C. C. A. 349.

Westinghouse Elec. & Mfg. Co. v. Idaho Ry., L. & P. Co., 228 Fed. 972.

(10) Even if general creditors had a right under the state statutes or decisions to avoid the lien of the trustee, or if the Receiver as their representative or by virtue of the rights conferred upon him for their benefit by statutes or decisions had such a right, the assets or property of the insolvent debtor so taken from under the lien of the trust deed would be assets of the debtor Power Company and should be ratably and equitably distributed for the benefit of all its creditors.

Thompson v. Huron Lbr. Co., 4 Wash. 600; 30 Pac. 741.

Bailey v. Mosher, 63 Fed. 488.

High on Receivers, sec. 819-c, 439-b.

7 R. C. L. Corporation, sec. 765.
Thompson, Corporations (2nd ed.), sec. 6396.
Glenn, Creditors' Rights and Remedies, secs. 314, 316, 319.
Beach, Receivers, secs. 441, 444.
Clark v. Bacorn, 116 Fed. 617; 54 C. C. A. 73.
Penn. S. Co. v. New York City Ry. Co., 198 Fed. 721, 738; 117 C. C. A. 491.
H. K. Porter v. Boyd, 171 Fed. 305; 98 C. C. A. 160.

ARGUMENT.

We have here the anomalous situation that a Court of equity, after appointing a chancery Receiver for an insolvent corporation, to marshal and administer its assets for the protection and preservation of the respective rights and equities of all its creditors, enters a decree to the effect that a certain few of the unsecured general creditors, representing but a small part of the total claims filed with the Receiver, have by virtue of the appointment of the Receiver and the filing and allowance of their claims in the Receivership suit, acquired a preference over the other creditors, and a lien upon or interest in the assets sufficient to defeat a mortgage of its priority, notwithstanding the order appointing the Receiver comprehended all creditors, both secured and unsecured.

The decision of the Court seriously affected not only the Trustee, whose mortgage the Court held could be assailed by these few creditors because of the right or lien that vested in them by virtue of the

appointment of the Receiver and because of the fact that they had filed their claims in the Receivership suit and obtained the hasty approval thereof without notice to or knowledge thereof by other creditors, but it seriously affected other creditors, for it permits these few favored creditors to obtain assets which, if not subject to the lien of the Trustee, should be administered by the Receiver in the Receivership suit for the equal and pro rata benefit of all creditors.

The Trustee has the double grievance; first, under the ruling of the Court these favored creditors became, through the appointment of the Receiver, vested with the right which they did not have when the Receiver was appointed, to attack the mortgage and remove from under the lien thereof assets to the value of $45,000.00; and, second, the Court held that the assets so removed from the lien of the mortgage by these creditors, should be distributed to such creditors instead of being turned over to the Receiver for administration in the Receivership suit for the benefit of *all creditors*. In the latter event, the Trustee would have received its proportionate part thereof on its deficiency. The Trustee, therefore, contends, first, that the lien of its mortgage was superior to the claim of the unsecured creditors who were permitted to attack the same; second, that if it cannot hold the property under the lien of its mortgage, it should be administered in the Receivership suit for the equal and pro rata benefit of all creditors in accordance with the principles governing the distribution of assets in a general creditors' suit.

With these preliminary observations, we pass to a consideration of the legal and equitable principles governing chancery Receivers and the effect of the appointment of such Receivers upon the rights of the creditors.

I.

The Receiver in the case at bar is a chancery Receiver for the preservation of the interests of all parties, and he has no greater rights than those he represents, and his appointment conferred no additional rights upon any creditor or party.

A chancery Receiver is often given special rights of representation, powers and rights in property, depending upon local statutes or decisions and upon the nature, purpose and scope of the suit in which he is appointed.

The Receiver appointed by the Court in the suit commenced by Guy I. Towle against the Power Company (Rec., 159) was appointed for the purpose of marshalling the assets of the Power Company and to hold, manage and operate the same and protect and preserve the rights and equities of all creditors and other parties in interest (Rec., 167 to 171). Clearly, such a Receiver is a general chancery Receiver not appointed for the benefit of any particular person or class, nor to impound any specific property for the satisfaction of any specific class. Such a Receiver derives his authority from the Court and not from the party or parties at whose instance he is appointed. He acts on behalf of no particular interest, but guards the rights of all. As such, he can

represent any of such interests and is clothed with their rights, but by his appointment he acquires no rights in addition to those that he represents, nor does he confer any right upon any interest represented by him. In the faithful performance of his duties, and in carrying out the purposes of his appointment, he does represent any and all litigant parties, but he neither receives nor confers any additional rights, and the rights, equities and priorities of all parties are preserved and protected by him as of the date of his appointment.

It is conceded and admitted by the general creditors, Guy I. Towle, Carl J. Hahn, Jake M. Shank, and L. M. Plumer and E. B. Scull, in their pleadings in this cause (Rec., 88, 104, 124, 138), that they were merely general creditors and that prior to the appointment of the Receiver they had acquired no lien by any process upon any of the property of the Power Company. The trial court based their right to be paid in full upon the lien acquired by virtue of the appointment of the Receiver and the filing of their claims with and the allowance thereof by such Receiver (Rec., 182 to 185).

Where a state statute or the decisions of the highest court of the state confer upon a Receiver in a certain class of cases special powers and rights in property, the general rule as to a chancery Receiver is inapplicable. And where, under the state decisions or statutes, a Receiver can avoid conveyances and encumbrances, clearly the Federal Courts will follow the local law in cases arising in those jurisdictions.

We will hereinafter in a separate proposition take up the discussion of the effect of such statutes and decisions upon the rights of a Receiver appointed in those jurisdictions, and will show that there is no statute or decision in the State of Idaho conferring upon the Receiver any greater rights, by virtue of his appointment, than those possessed by the parties whom he represents. In discussing these state decisions and statutes, we will also take up the law of Idaho and show that under the decisions and statutes of this state the lien of the Trustee could not be questioned by a general creditor or anyone not having secured a lien by contract or process upon the property of the debtor. We will, however, first discuss the general proposition as to whether or not in the Receivership suit the creditors, Guy I. Towle, Carl J. Hahn, Jake M. Shank and L. M. Plumer and E. B. Scull, admittedly general unsecured creditors, acquired any greater rights by virtue of the appointment of the Receiver than they had prior thereto, or conferred upon the Receiver greater rights than those of the creditors whom he represented.

Mr. Pomeroy (Pomeroy, Eq. Juris., vol. 4, sec. 1336), after setting forth the several classes of cases in which a Receiver is appointed in equity, states the general rule relative to his powers, rights and duties as follows:

> "The appointment of a Receiver during the pendency of a suit does not determine any rights or title of the litigant parties; it is made for the benefit of all. His possession, though impartial,

while the controversy is undecided, is regarded as on behalf of the one who is ultimately decided to be entitled to the property."

Mr. High (High on Receivers, p. 12) says:

"And since a Receiver derives his title from the Court rather than from the act of the parties upon whose application or by whose consent he is appointed, it necessarily follows that the effect of his appointment is to place the property in his custody as an officer of the Court for the benefit of whoever may ultimately prove to be entitled thereto but without effecting any change of title to the property."

As stated above, and as appears from the record, the Receiver in the Towle suit was appointed for the preservation and protection of all interests. Where a Receiver is appointed on behalf of a mortgagee in a foreclosure suit, it has frequently been contended with much force that such a Receiver confers upon the mortgagee rights in addition to those that he had at the time of the appointment. The reasons that obtain in such cases are much stronger than in a general creditors' suit, but the Courts have generally declined to depart from the rule as stated by Pomeroy and High.

In Central Trust Co. of New York v. Worcester Cycle Mfg. Co., 93 Fed. 712, 35 C. C. A. 547, a Receiver had been appointed on behalf of a mortgagee in a foreclosure suit, and it was contended that the Receiver, having been appointed on behalf of the

mortgagee, such appointment was a sufficient possession by the mortgagee to cure and perfect his rights under a mortgage, which under the law of the state would become valid where such possession was taken prior to the intervention of other claims.

The Circuit Court of Appeals clearly held that the rights of all parties were fixed as of the time that the Receiver was appointed, and such appointment could not be held to change or add to the rights of any party, saying:

> "The property is taken by the Court, and is put into the hands of its officer to hold for the benefit of 'whom it may concern'. He holds and manages it for the benefit of the party to whom the Court may ultimately decide that it belongs, *but it would be a perversion of the whole theory of custodia legis if the mere appointment of a Receiver were itself determinative of that 'ultimate decision'*. The proposition here contended for is an instance of reasoning in a circle. Conceding the soundness of the conclusion expressed ante—that as to the personal property the description was imperfect, and the mortgage therefore fraudulent as to creditors, the appellant's argument may be thus stated: 'I cannot show myself to be ultimately entitled to the property unless I can prove a mortgage superior to the rights of creditors. The mortgage I have proved is void as to creditors unless I can show that I have taken possession. The possession of the Receiver must be considered to be my possession

only because I am ultimately held to be entitled to the property, but the reason why I am ultimately held to be entitled to the property is the very assumption that the Receiver's possession is my possession.' The property is put into the hands of the Receiver only to preserve it from harm, to secure its accretions, and to insure its delivery unimpaired to the successful litigant, *but the custody of the Receiver should not be held to make any change in the status of any litigant's title.* In the case at bar, so far as the personal property is concerned, it cannot be said that the mortgagee is the successful litigant. The creditors, in the person of their trustee, Goodrich, who has been made a party litigant, have prevailed, since they have shown that, down to the time the Court seized the property, nothing which mortgagor and mortgagee had done had operated to impair their rights to proceed against the *res. If the mortgage were fraudulent as against creditors then, it remains fraudulent, although an officer of the Court has taken charge of it temporarily.*" (Our italics.)

The reasoning of the Court is certainly both logical and cogent. If the mortgage was fraudulent so that under the statutes and decisions of the state in which the case arose, the creditors at the time the Receiver was appointed could have set the same aside, then the mere appointment of the Receiver does not deprive them of their right. For instance, if under the laws

of Idaho, general creditors could avoid an unrecorded chattel mortgage and had such a right at the time the Receiver was appointed, clearly the Receiver could not deprive them of that right, and as the representative of all interests the Receiver could on behalf of such general creditors avoid the unrecorded instrument.

The Court in the Central Trust Co. v. Worcester Cycle Mfg. Co. case in support of the general principle stated above, quotes the following authorities:

> "The effect of the appointment of a Receiver of mortgaged premises *is not to oust any party of his right* to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and, when the party entitled to the estate has been ascertained, the Receiver will be considered his Receiver." (Our italics.) Wiswall v. Sampson, 14 How. 52.
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> "He is an officer of the Court. His appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in *custodia legis* for whoever can make out a title to it. It is the Court itself which has the care of the property in dispute." Booth v. Clark, 17 How. 322.
>
> "A Receiver derives his authority from the act of the Court, and not from the act of the parties at whose suggestion or by whose consent he is

appointed, and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the Court, for the benefit of the party ultimately proved to be entitled, *but not to change the title, or even the right of possession, in the property.*" (Our italics.) Chicago Union Bank v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. 1013.

The same question arose in a different manner in Central Appalachian Co. v. Buchanan, 33 C. C. A. 107; 90 Fed. 454. The specific question was whether the appointment of a Receiver at the instance of a judgment creditor affected in any way the right to an equitable set-off which the creditor had as against the debtor prior to the appointment of the Receiver. The Circuit Court of Appeals for the Sixth Circuit, consisting of Judges Taft, Lurton and Clark, said:

"It is urged that this right of set-off cannot be asserted against a judgment in favor of a Receiver of the warrantor. The record in which Buchanan was appointed Receiver is not filed. We must assume that he was appointed under the *usual proceeding by creditors against an insolvent business corporation, and that no priority was sought or acquired.* This is in accord with the averments of the cross-bill touching this appointment, which in substance are that he was appointed for the purpose of holding possession of the assets of the company, and of collecting its debts, and that his suit was for rents, which accrued to the Southern Land & Improvement Co. as lessor,

under a contract with the Central Appalachian Company as lessee, and that 'his recovery was alone in right of that company', and in pursuance of an order that he should 'collect all demands which were due or should become due' to said company. *Such an appointment does not change the title or impose any lien upon the property in possession of the Receiver.* He is a mere custodian of the Court, holding and protecting the property to await its ultimate disposition by the Court, according as the right might appear. *No right of priority is ordinarily fixed by such appointment. It cuts off the right to acquire liens, but imposes none by virtue of the step alone.* (Our italics.) Railroad Co. v. Humphries, 145 U. S. 82, 12 Sup. Ct. 787; Union Bank v. Kansas City Bank, 136 U. S. 223, 236, 10 Sup. Ct. 1013; New York P. & O. R. Co. v. New York, L. E. & W. R. Co., 58 Fed. 268, 278, High, Rec., sec. 5."

Here was clearly a case where a Receiver had been appointed at the instance of a creditor, and no local statute or decision affected the Court's ruling; the rights and priorities of all parties were fixed as of the date of the appointment of the Receiver, and no priority or preference was acquired by such appointment. The rule is clear that such appointment cuts off the right to acquire liens but imposes none by virtue of that step alone. But if any of the parties represented by the Receiver had a right, at the time of the appointment, to avoid or set aside a conveyance,

then clearly such creditor is not deprived of his right, and the Receiver may enforce it for him.

That the appointment of a Receiver like the one involved in this case does not constitute a sequestration or impounding of certain assets for the benefit of a particular person or class appears from the decision in Quincy M. & P. R. Co. v. Humphries, 145 U. S. 582, 36 L. ed. 632. The specific question was as to whether the Receiver was committed to pay rents under a lease. Mr. Justice Fuller, in stating the facts, says:

> "The company was insolvent. Its preferential indebtedness amounted to nearly four and one-half millions; its credit was gone and many parts of the property were in wretched condition. The bill was obviously framed upon the theory that an insolvent railroad corporation has a standing in a Court of equity to surrender its property into the custody of the Court to be preserved and disposed of according to the rights of its various creditors and in the meantime operated in the public interest. *The relief sought was predicated upon the view that those rights were not changed by the application and that the proceeding was in the interest of each and all of them as such interest might appear.*" (Our italics.)

The Court denied the right to collect the rents due on the lease from the Receiver, saying:

> "But the Receivers were not statutory Receivers, nor did they occupy identically the same position as assignees in bankruptcy or insolvency and

the like. * * * * * The ordinary chancery Receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the Court; and, by special authority, may become an officer of the Court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned. If the order of the Court, under which the Receiver acts, embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the term, in any proper sense of the word. He holds that, as he would hold any other personal property involved, for and as the hand of the Court, and not as assignee of the term."

In Kneeland v. American Loan and Trust Co. of Boston, 136 U. S. 89, 34 L. ed. 379, the question arose as to priority of certain rentals, the Court, speaking generally of the powers of Receivers, said:

"Upon these facts, we remark, first, that the appointment of a Receiver vests in the Court no absolute control over the property, *and no general authority to displace vested contract liens.* Because in a few specified and limited cases this Court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a Court appointing a Receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a Court appointing a Receiver could rightfully burden the mortgaged property

for the payment of any unsecured indebtedness. Indeed, we are advised that some Courts have made the appointment of a Receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the Court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot."

The Circuit Court, Judges Lurton, Taft and Ricks sitting, in the case of N. Y. P. & O. R. Co. v. N. Y. L. E. & W. R. Co., 58 Fed. 268, speaking of the effect of the appointment of Receivers upon the interests procuring the appointment, quoted Chief Justice Waite as follows:

"The possession taken by the Receiver is only that of the Court, whose officer he is, and adds nothing to the previously existing title of the mortgages. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, *and in the meantime the Court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place.*" (Our italics.)

and added thereto the following:

"*A Receiver represents no particular interest or class of interests.* He holds for the benefit of

all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. They are not assignees, and the principles of common law applicable to assignees to not define or determine the character of a Receiver's possession or its effect upon the rights of those interested in the property in their possession. *Receivers ought not to be appointed to represent the peculiar interests of one class, and, a fortiori, they should not be appointed to represent one interest out of a class of interests.*" (Our italics.)

In Meyer v. Western Car Co., 122 U. S. 1, 26 L. ed. 59, a case arising from Iowa, the specific question was whether certain creditors, who, upon the filing of their bill to foreclose a mortgage, had acquired a lien or special interest in certain property by virtue of the appointment of a Receiver, sufficient under the local law to entitle them to contest the lien created by a conditional sale, which is the identical question that arises in the case at bar; and the Court, speaking through Mr. Justice Waite, said:

"This leaves no doubt, and clearly confines the operation of the text to such creditors as have by suit perfected a right to impeach the transaction. Such has always been the rule in respect to conveyances made to hinder and delay creditors. Until such suit was commenced, the parties were at liberty to deal as they pleased with the property conveyed, and the rights of creditors were determined by the condition in which the property

was when they interfered. It is clear, therefore, that these appellants, as creditors at large, had acquired no such special interest in the property, when their bill to foreclose their mortgage was filed, as would give them the right to contest the validity of the Car Company's title. *As against them, in the condition they were, the lien created by the conditional sale was, to all intents and purposes, valid and subsisting when the Receiver, on his appointment, took possession of the property;* and this possession, as we said in Fosdick v. Schall, was for the benefit of whomsoever in the end it should be found to concern. *The rights of the parties were fixed at the moment the property was taken by the Court through its Receiver into its own possession.* At that time these appellants were not either execution or attaching creditors." (Our italics.)

In Ames v. U. P. Ry. Co., 20 C. C. A. 432, 74 Fed. 332, speaking generally of the status of Receivers, the Court said:

"Do receivers of an insolvent corporation, appointed at the suit of stockholders or creditors, stand in the shoes of the insolvent corporation, or in the shoes of the complainants in the suit? Have such receivers no higher right or greater power to charge the trust estate in their hands with the current liabilities which they incur in its administration than the insolvent corporation or the complainants in the suit, at whose instance or for whose benefit they were appointed, would

have had if they were operating the property? An affirmative answer to these questions is indispensable to the maintenance of this argument. We had occasion to consider them early in the administration of these trusts, and our conclusion was thus expressed:

" 'It is well settled that the receivers of an insolvent railroad corporation, appointed by a Court of chancery, to preserve its property and operate its railroads, do not stand in the shoes of the corporation. They are neither the representatives of the insolvent corporation, nor of its creditors or stockholders. They are the officers and representatives of the Court, the hands of the Court, in which it holds the property which it operates the railroads of the insolvent corporation for the benefit of those ultimately entitled to the property and the income.' Ames v. Railway Co., 60 Fed. 966, 969.

"In Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223, 236, 10 Sup. Ct. 1013, the Supreme Court said:

" 'A receiver derives his authority from the act of the Court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed.' Railroad Co. v. Humphreys, 145 U. S. 82, 97; 12 Sup. Ct. 787.

"These five receivers, then, were the custodians of the property of each of these corporations, the mere ministerial officers of the Court, charged with the duty of preserving and operating the

railroads of each of these corporations, for the *benefit of those who should ultimately be adjudged to be entitled to the income they derived and the proceeds of the property they sold.* The corporations to which the various properties belonged were insolvent. They were unable to discharge their duties to the public—their duties of maintaining and operating these railroads. They were unable to discharge their duties to private citizens—their duties of performing their contracts and paying their debts. The receivers were, therefore, neither bound by the contracts nor limited by the contractual relations of these corporations. They stood not in the shoes of the corporations nor of the complainants in the suit, but they stood in the place of the Court. They were the hands of the Court, preserving and operating the properties in their charge under its direction." (Our italics.)

The statement that the status of the property and all interests are preserved as of the date of the appointment of the Receiver is merely another way of saying that by virtue of such appointment nothing is added to the title of any party.

In Commonwealth Roofing Co. v. North American, etc., Co., 68 C. C. A. 418, 135 Fed. 984, the Court, in discussing the rights of a creditor in reference to liens existing at the time of the appointment of the Receiver, said:

"In the present case, notwithstanding leave had been given to proceed by writ of attachment,

the Circuit Court, as we have already said, properly took jurisdiction of, and passed upon, the claims of the appellant. How can it be deemed necessary that, in order that a lien existing when a receiver is appointed should be satisfied, proceedings should be taken by writ of attachment, when, after all, the Court which appoints the receiver has the power to treat such proceedings as futile? This question is answered by the broad rule which we have stated. *The just conclusion is that, when a receiver of specific property has been appointed by a Court having competent jurisdiction, the status of the property and all interests are preserved as of the date of the appointment, subject to a disposition of all the same by the chancellor on due and seasonable application in reference thereto.*" (Our italics.)

In the case of Mercantile Trust Co. v. Southern Lands and Timber Co., 30 C. C. A. 349, 86 Fed. 711, the question arising as to whether the status of the rights of the parties were fixed as of the date of the appointment of the Receiver, the Court said:

"We believe it has been the uniform practice in this circuit for more than 20 years, in conducting administrations of this kind, to recognize the liens as they existed at the institution of the suit. It would, in our opinion, *impede and embarrass the proceedings of such an administration, discredit the Court, and do despite to the rule of equality in which equity delights, to suffer such*

a claim for preference as is made by the interveners here to prevail. We therefore hold that the interveners did not, by putting their claims in judgment, acquire any better right than they had at the institution of this suit. We believe that this holding is in accordance with all the more recent and better considered of the adjudged cases bearing on the questions involved. Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, and the cases therein cited." (Our italics.)

And the same Court, referring to the status and rights of a Receiver, said:

"A court of equity, at the instance of the proper parties, will then make those funds trust funds, which in other circumstances is as much the absolute right of the corporation as any man's property is his. This cannot better be done or be better evidenced than by seizing the property; and, when a Court does take into its possession the assets of an insolvent corporation, it will administer these assets on the theory that they in equity belong, first, to the creditors; and, if there is more than sufficient to satisfy the creditors, then to the stockholders rather than to the corporation itself. There are degrees of insolvency, and it does not necessarily reach that extremity which excludes stockholders before this jurisdiction in equity supervenes. *The chief object and duty of a court of equity in taking possession of an*

insolvent estate is to preserve it and secure its distribution among the creditors, according to their rights therein at the time of taking it into possession, or (where these are not simultaneous) at the institution of proceedings to that end." (Our italics.)

If, then, the rights of a creditor and of all parties are fixed as of the time of the Receiver's appointment, and no one creditor by putting his claim in judgment can secure a preference as against another creditor, whether that creditor be secured or unsecured, then it necessarily follows that, unless there is some local statute or decision giving him or the receiver such rights or interests in the property as will enable him to defeat the right of another creditor, the rights of all creditors must be measured and determined as of the date of the appointment of the receiver. We submit that the authorities uniformly hold that neither the appointment of a receiver, nor the allowance of the claim by the receiver, nor the obtaining of a judgment in another court will give one creditor a preference over another, in the absence of local law giving such preference.

Thus, in Savings and Trust Co. of Cleveland against Bear Valley Irrigation Co., 93 Fed. 339, Circuit Judge Ross said:

"The Spreckels Bros. Commercial Company, therefore, has not acquired any judgment lien upon any of the realty covered by the mortgage or receivers' certificate upon which the bill is

based, and has only a personal judgment against the Bear Valley Irrigation Company. Savings & Trust Co. v. Bear Valley Irr. Co., 89 Fed. 32. 'And the same reasons, or reasons equally strong as those which have settled the question that a judgment subsequently acquired in another Court, or in the same Court in another suit, does not create a legal lien on any of the property being administered, exclude the holder from acquiring thereby an equitable lien or right of preference in the assets.' Mercantile Trust Co. v. Southern States Land & Timber Co., 30 C. C. A. 359, 86 Fed. 711, 721; Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788."

And the Circuit Court of Appeals for the Ninth Circuit, in Clark v. Bacorn, 54 C. C. A. 73, 116 Fed. 617, in discussing the same general principle, said:

"The specifications of error present the single question whether the facts alleged in appellants' bill of complaint constitute such a cause of action as would entitle them to the equitable relief sought; in other words, have the appellants a lien upon the property or funds in the hands of the receiver, Bacorn, superior to that of other creditors? We think this question must be answered in the negative. *It is well settled that when a corporation becomes insolvent, and the corporate assets have passed into the hands of a receiver, such assets constitute a fund for ratable*

distribution among its creditors; and no creditor can, by suit commenced or judgment recovered after the commencement of the proceedings to secure the appointment of a receiver, secure a lien upon the corporate assets that will entitle such creditor to priority of payment. Thompson, in sec. 7060 of his work on Corporations, states the reason for this rule to be that 'the proceeding in which the receiver is appointed is a judicial assignment of the property of the insolvent for a ratable distribution, and no creditors are allowed, therefore, by any act subsequently done, to get liens or preferences in respect to it.' *It would, indeed, seem anomalous that a lien adverse to the rights of the receiver could be obtained, and thus interfere with one of the objects of his appointment in the control of the distribution of the assets.*" (Our italics.)

In the case at bar not only did the trial court permit certain general creditors to contest the lien of a secured creditor by virtue of the rights they acquired by the appointment of the receiver, but the Court also permitted such general creditors to set up a claim and lien adverse and superior to the rights of the receiver, and it based such rights upon the appointment of such receiver.

The trial court in its decision (Rec., 181, 182) says:

> "By intervening creditors and the Receiver it is urged that as to the personal property which the instrument purports to cover it is void."

The Receiver prayed that only so much of the property as the Court should find to be covered by the lien of the Trustee should be sold and that the Receiver be given all proper relief. (Rec., 87.) Surely, it cannot be denied that the Receiver as the representative of all parties in the Receivership Suit represented the unsecured general creditors as well as secured creditors.

In Atlantic Trust Co. v. Dana, 62 C. C. A. 657, 128 Fed. 209, the Court, speaking of the effect of a decree against a receiver as to the rights of the creditors, said:

> "The creditors, Dana and Whiting, were not actual parties to the Strong suit, but they were *represented by the receiver, and are as much bound by the decree as he is.* They were what are sometimes termed *quasi* parties. Upon the appointment of the receiver the right to enforce the payment of hydrants' rental and other rights in action due to the water company, or becoming due during the continuance of the receivership, vested in the receiver, and *he became the proper party to prosecute all necessary suits for that purpose, and to defend such suits as should be commenced for the purpose of establishing claims against or rights to the property of the water company.* Porter v. Sabin, 149 U. S. 473, 478, 13 Sup. Ct. 1008, 37 L. ed. 815; Doggett v. Railroad Co., 99 U. S. 72, 78, 25 L. ed. 301; Express Co. v. Railroad, 99 U. S. 191, 199, 25 L. ed. 319; Gray v. Davis, 10 Fed. Cas. 1006, 1009; Davis v.

Gray, 16 Wall. 203, 217, 219, 21 L. ed. 447; High on Receivers (3rd ed.), sec. 316. In such suits, whether brought by the receiver or against him, it is not necessary, and generally is not even proper, to join creditors of the debtor company with the receiver as parties. Doggett v. Railroad Co., Express Co. v. Railroad Co., Gray v. Davis, *supra. The receiver is the representative of the Court and of all the parties in interest, and can neither surrender to others nor divide with them the management of the prosecution or defense of such suits or the responsibility therefor.* Doggett v. Railroad Co., Express Co. v. Railroad Co., Porter v. Sabin, 149 U. S. 479, 13 Sup. Ct. 1008, 37 L. ed. 815; Gray v. Davis, *supra;* Ames v. U. P. Ry. Co., *supra;* High on Receivers (3rd ed.), secs. 134, 135, 650; Jones on Railroad Securities, sec. 495. Where it is necessary to apply for and obtain leave of Court to sue a receiver in his official capacity, 'it is not essential to the jurisdiction of the Court over the receiver, or to the validity of the order, that the application should be based upon notice to the parties in the action wherein the receiver was appointed. It is sufficient that leave be granted by the Court having control over the receiver, upon notice to him, against whom alone the cause of action exists, and against whom the proceedings must be brought.' High on Receivers (3rd ed.), sec. 265; Porter v. Bunnell, 20 O. St., 150, 158; Farwell v. Great Western Railroad Co., 161

Ill. 522, 618, 44 N. E. 891. The principle underlying the several cases bearing upon the representative character of a receiver is well shown in Gray v. Davis, *supra.* It was a case wherein a receiver appointed in a railroad foreclosure suit filed a bill against officers of the State of Texas to enjoin them from taking certain action calculated to impair property interests of the railroad company in the charge of the receiver, and held by him for the benefit of the creditors of the company. A demurrer was interposed upon the ground that the creditors to be affected were not made parties to the bill. The demurrer was overruled, the circuit judge saying:

" 'The creditors are neither necessary nor proper parties, because they are represented by the complainant who is receiver.' Gray v. Davis, 10 Fed. Cas. 1009. This ruling was affirmed in the Supreme Court, where it was stated:

" '*A receiver was appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession.* Hence the appointment has been said to be an equitable execution. He is virtually a representative of the Court, and of all the parties in interest in the litigation wherein he is appointed. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in

> the possession of either the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned. Davis v. Gray, 16 Wall. 217, 27 L. ed. 447. (Our italics.)

Clearly, then, if the creditors, whether secured or unsecured, acquired no rights by the appointment of the receiver, and if their respective rights and priorities were fixed as of that date and they could not thereafter acquire a lien or preference so as to defeat the rights of any other creditor represented by the Receiver, surely, *a fortiori*, they could not set up a claim or lien *superior and paramount to that of the Receiver;* and if the Receiver, as the representative of all the creditors of the Power Company, could have contested the claim of the Trustee for and on behalf of creditors who had a right to avoid any conveyance or encumbrance, or who had a right to defeat the claim of any other creditor at the time of the appointment of the Receiver, was held by the Court in this case not to have such a right or interest as would defeat the lien of the Trustee as to certain personalty, then how can it be said that some of the creditors represented by the same Receiver, who admittedly had no such right prior to the appointment of the Receiver, have by virtue of such appointment acquired such a right?

Mr. High (High on Receivers, sec. 456), in discussing the right of representation of a receiver, says:

> "The functions and powers of the receiver as regards rights of action to set aside fraudulent

transfers made by the debtor being limited to such rights of action as the judgment creditor might himself have maintained, *he cannot effect a result which the creditor himself could not have effected;* hence he stands in the place of the judgment creditor and is limited by any acts or conduct on his part which would have barred proceedings by the creditor himself. And when the creditor is estopped by his own act from proceeding against the debtor or his assignee to set aside a fraudulent assignment of the debtor's property, such estoppel applies equally as against the receiver appointed in aid of such creditor."

If the creditors for whose protection the Receiver was appointed had the right to defeat the lien of the Trustee, then there is no question but that the Receiver could on behalf of such creditors defeat such lien. But, as in the case of estoppel, where the creditors that he represents had no such right at the time of the appointment of the Receiver, the Receiver has no greater rights than the parties whom he represents.

The question as to what interest in the assets of a corporation was acquired by the parties represented by a receiver upon his appointment arose in Shaffer v. McCulloch (C. C. A., 7th circuit), 192 Fed. 801. A receiver had been appointed at the instance of a creditor for the purpose of equitably distributing all the assets of the debtor corporation and for the preservation and protection of the rights of all creditors. A preferred stockholder intervened, setting

up his claim. Later the claim of the creditor who had applied for a receiver was purchased by Shaffer, who thereupon applied to the Court that the receiver be discharged, setting forth that the debtor was now solvent. To such a discharge the intervener objected, claiming an interest in the trust fund which could not be divested without his consent. The Court said:

"Assuming the Court's premise—that the appointment of a receiver under the circumstances named, vested McCulloch as a preferred stockholder with an interest in the trust fund of which nothing could divest him except his own consent —the Court was right in entering the decree notwithstanding the motions of the creditors.

"But does this correctly define McCulloch's relation to the so-called trust fund? Does the bringing of such a creditors' suit and the appointment of a receiver, determining for the time being that the corporation is insolvent, become a judicial determination so final that the status is not ended, except by consent of the stockholders, one and all, as well as the creditors? Is the trust fund character impressed upon the assets of a receiver so irrevocable, that notwithstanding to proceed to finally wind up the corporation and distribute its assets would be an injury to its interests as an entirety, and notwithstanding those who initiated the movement and all who joined in it as creditors are willing that the proceedings should be recalled on terms that would do none of the interests injury, the Court has no authority to do

other than to go on to final distribution? Cannot creditors who have thrown a growing concern into chancery, a concern depending like this one upon its being a going concern, for its chief value, repent their conduct and thereupon permit it to be taken out of chancery? Upon these questions we are left without any serious doubt. They answer themselves. To answer them the way the Court below has answered them would be to forbid a court of chancery from giving, at any time, a helping hand, except at the risk, which the Court itself could not avoid, of making it a hand that an indignant stockholder may successfully lay hold of to blight and destroy.

"There is nothing in the cases cited that establishes the view taken. None of them involve, even remotely, the question involved. What is said in each of them (as quoted) about the assets of insolvent corporations being trust funds is consistent with the power of creditors who have put a corporation into chancery to consent that it be taken out again—the terms being a matter for each individual case as it arises. Whatever uncertainty is raised by these quotations is not in the doctrine, but in the application of the doctrine. And the one expression, in all cases, that most nearly applies the doctrine to the case in hand is that of Justice Brewer in Hollins v. Brierfield Coal and Iron Company, *infra*, wherein, after reviewing all these cases, and stating the doctrine in general terms, he continues:

" 'It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder.'

"That sentence seems to us to exactly express the application of the doctrine to the case before us. From the moment the bill was filed and the receiver was appointed, *the assets of the corporation became a trust in the 'administration' of the property. That does not mean that the stockholders acquired a relation to the property they did not have before; it means that they may insist that while the administration continues the assets shall be treated as trust funds, and if distribution takes place, shall be distributed as trust funds. By the appointment of a receiver McCulloch acquired no rights upon the property he did not have before; what he acquired was that whatever equities he had should be taken care of in the administration of the property. The trust attaches to the 'administration' of the property, and is raised and ceased whenever the administration of the property ceases.*" (Our italics.)

Both Courts and text writers have frequently expressed themselves in general terms that may convey a broader application than was intended. The doctrine that runs through all the cases is that the property in the hands of the Receiver is in a sense a sequestration for the benefit of all parties represented

by the Receiver; as against the corporation, it is a trust fund for the benefit of creditors, but as J. Grosscup says in the case last cited, this does not mean that any one acquired a relation to the property they did not have before the appointment; that the only rights that any creditor acquires by virtue of such appointment is that whatever equities he had at the time of the appointment of the receiver shall be protected and observed in the administration of the property; that the trust attaches to the administration of the property and is raised and ceases whenever the administration of the property ceases.

We pass now to a consideration of the effect of the local statutes upon the rights and powers of general chancery receivers.

II.

In Idaho a chattel mortgage, unrecorded and unaccompanied by the affidavit of good faith required by statute is valid as to the parties and as to all creditors excepting those having a lien upon the property by attachment or some process, and there are neither statutory provisions nor decisions in the State of Idaho giving either a receiver representing general creditors or such general creditors by virtue of the appointment of a receiver a lien sufficient to contest such a chattel mortgage.

The decisions of State and Federal Courts from jurisdictions where the local statutes modify the rules as to chancery receivers, have no application here, but we will discuss them inasmuch as the trial

court has endeavored to support its decision by such citations.

A question similar to the one involved here arose in Ohio in the case of Hamilton v. David C. Beggs Co., 179 Fed. 949. The Court said:

> "*In Ohio the relation which a receiver bears to property given into his possession is so similar to that sustained by the assignee of an insolvent debtor, that, if the property covered by an unfiled chattel mortgage passes into the hands of a receiver, the lien of the mortgage is lost, and the rights of the creditors are the same as if the mortgagor had made an assignment in trust for their benefit. The reason for this is found in the Ohio doctrine that the receiver's appointment 'is an equitable remedy, bearing the same relation to courts of equity that proceedings in attachment bear to courts of law; the appointment being treated as an equitable execution.* The purpose is to secure means for satisfying the final order and judgment of the Court in the action, and the effect of the seizure is to place the property seized in the custody of the Court. Railroad Co. v. Sloan, 31 Ohio St. 1'; Chency v. Maumee Cycle Co., 64 Ohio St., 205, 60 N. E. 207. The word 'creditors', used in the statute requiring the filing of contracts of conditional sale, refers to the same class as the word 'creditors' found in the chattel mortgage act, and consequently the former act renders the unfiled contract void as to the same class of creditors as is mentioned in the

latter act. York Mfg. Co. v. Cassell, *supra;* Dolle v. Cassell, 135 Fed. 52, 67 C. C. A. 526. It follows, therefore, that if the property of a vendee, held under an unfiled contract of conditional sale, has passed into the hands of a receiver, and if no specific lien has been fastened on it, it is to be administered for the benefit of the vendee's creditors, *unless the federal rule as to the status of receivers and of property involved in a receivership necessitates a different conclusion.* That rule is that

" 'The possession of the receiver is only that of the Court, whose officer he is, and adds nothing to the previously existing title of the mortgagee. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the Court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place.' Fosdick v. Schall, 99 U. S. 235, 251, 25 L. ed. 339; Thompson v. Phoenix Ins. Co., 136 U. S. 287, 297, 10 Sup. Ct., 1019; 34 L. ed. 408; White v. Ewing, 159 U. S. 36, 39, 15 Sup. Ct. 1018, 40 L. ed. 67." (Our italics.)

No case that has come to our attention more clearly distinguishes the cases arising under local statutes and decisions giving certain powers and rights in property to receivers from the customary rule in Federal equity courts. Clearly where there are such decisions and statutes in a state, the federal courts

will follow them. The Court, continuing, quotes as follows:

"Sec. 721, Rev. Stats. U. S. (U. S. Comp. St. 1901, p. 581), provides that:

" 'The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.'

"In Bucher v. Cheshire Railroad Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. ed. 975, it was said that:

" 'Where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer or sale of property, and the rules which affect the title and the possession thereto, they are to be treated as laws of that state by the federal courts.'

"The law of a state, therefore, is to be found, not only in its statutes, but also in the course of decisions, if there be such, rendered by its highest courts in reference to a given subject-matter, which have become rules of property.

"Federal courts will, in actions at common law, on causes of action not created by federal statutes, follow the recording acts and statutes relating to chattel mortgages, conditional sales, and insolvents' assignments, so far as they are affect-

ed by the bankruptcy act. Foster's Fed. Prac. (4th ed.), sec. 375. In Etheridge v. Sperry, 139 U. S. 276, 277, 11 Sup. Ct. 569, 35 L. ed. 171, Mr. Justice Brewer defined the attitude of federal courts as to chattel mortgage laws as follows:

" 'The matter is not one of purely general commercial law. While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property, are primarily, at least, a matter of state regulation. We are aware that there is a great diversity in the rulings on this question by the courts in the several states; but, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this Court will accept the settled law of each state as decisive in respect to any case arising therein. Chicago Union Bank v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. 1013.' "

The foregoing seems directly in point. Granting that the deed of trust and supplemental mortgages in this case were not filed or executed as provided by sec. 3408 of the Revised Codes of Idaho, who could raise valid objections thereto under the laws of Idaho? And are there any statutes or decisions in this

state granting a receiver any greater rights than the creditors had, or granting such creditors any additional rights by virtue of the appointment?

Sec. 3408 of the Rev. Codes of Idaho is as follows:

> "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless:
>
> "First. It is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors.
>
> "Second. It is acknowledged or proven, as grants of real estate, and the mortgage, or a true copy thereof, is filed for record with the county recorder of the county where such property is located and kept."

The mortgages here in question had been recorded in the mortgage records of each county in which the property was situated but they had not been filed as chattel mortgages. As stated heretofore, the creditors Guy I. Towle, Carl J. Hahn, Jake M. Shank and L. M. Plumer and E. B. Scull, are admittedly general creditors. There is nothing in any statute or decision in the State of Idaho to the effect that such general creditors acquired any greater rights by virtue of the appointment of a receiver than they had at the date of his appointment. In construing the above statute, the highest court of this state has repeatedly held that a general creditor, such as the creditors above named, can not contest or attack a

chattel mortgage not filed or executed in accordance with such statute.

In Neustadter Bros. v. Doust, 13 Ida. 617, the plaintiff sought to restrain the sheriff from selling property secured by a chattel mortgage and endeavored to resist the foreclosure of such mortgage. The Court held that the plaintiff as a general creditor had no such interest as to entitle him to resist the foreclosure of the mortgage. The Court says:

> "The question arises as to whether a general creditor who has no lien upon the property either by contract or by judgment, and who in no way connects himself with an interest in the property by lien or attachment, is an 'interested party' within the meaning of the statute."

The statute referred to is sec. 3418, Rev. Codes, which reads as follows:

> "The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the District Court by any person interested in so doing, for which an injunction may issue if necessary."

The Court continues:

> "The courts seem to have quite generally held that such a general creditor is not an interested party. It was held in an opinion by Mr. Justice Field of California in the case of Horn v. Volcano Water Co., 13 Cal. 63, 73 Am. Dec. 569, that in order for a person to be an 'interested party' so as to entitle him to intervene under a statute which authorizes 'interested persons' to inter-

vene, that his interest 'must be that created by a claim to the demand, or some part thereof, which is the subject of litigation. A simple contract creditor of a common debtor cannot intervene in a foreclosure suit.' The foregoing case seems to have been frequently cited and followed, as will be seen from 1 Cal. Notes 578.

"In Howe v. Cochran, 47 Minn. 403, 50 N. W. 368, the Supreme Court of Minnesota, in considering the right of a general creditor to contest the validity of a chattel mortgage, said: 'The defendants were not in position to question the bona fides of the mortgage to the plaintiff. It is only a subsequent purchaser or mortgagee or a creditor who has laid hold of the mortgaged property by legal process who on that ground can object that the mortgage is invalid.'

"In Peoples Savings Bank v. Bates, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679, a case that was taken up from the State of Michigan to the Supreme Court, it is said: 'A creditor at large cannot attack a chattel mortgage as fraudulent until he has obtained judgment, execution or some legal process against the mortgaged property.' The Supreme Court cites and reviews a number of cases in support of this position."

In Ryan v. Rogers, 14 Ida. 309, the Supreme Court quotes Neustetter Bros. v. Doust with approval, saying: "In this case the mortgagee took possession of the remaining property covered by the mortgage prior to any creditors' rights initiated by reason of

an attachment, lien or other incumbrance on the property, whereby a general creditor could bring himself within the purview of the statute and acquire a right to contest a mortgage."

In Martin v. Halloway, 16 Ida. 513, the Supreme Court again cites Neustetter Bros. v. Doust, as well as Ryan v. Rogers, saying: "Possession of the remaining mortgaged property having been taken by the mortgagee prior to the rights of any creditor attaching thereto, the mortgagee would be exempt from the application of the general rule. * * * We believe the rule announced in this case (43 Wis. 116) is correct, and that where a chattel mortgage is valid between the parties, even though for some reason it be void as to creditors, yet if the property be delivered to the mortgagee prior to the time any specific right or lien upon the property is acquired by a creditor, the possession of such mortgagee is valid and may be maintained and the property sold under the provisions of such mortgage."

The trial court, in direct violation of the rule established by the decisions of the Supreme Court of the state, permitted certain general creditors who had acquired neither a lien nor any specific interest by process or otherwise upon the mortgaged property to intervene and contest the lien of the Trustee. In view of the cases heretofore cited, if any one had the right to contest the mortgage, it was the Receiver; and he was a party to the suit. Yet the Court, holding that the Receiver had no such right, permitted certain general creditors who had filed their

claims in the creditors' suit and represented by that Receiver, to intervene and contest the lien of the Trustee. As we have seen, under the laws and decisions of the State of Idaho, the Receiver by virtue of his appointment acquired no such relation to the property of the Power Company that he could contest conveyances and incumbrances which the creditors, whom he represented, prior to his appointment had no right to contest.

Innumerable cases under statutes identical with that of Idaho can be cited to the effect that in order to intervene in a foreclosure suit the intervener must be more than a mere contract or general creditor.

In Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569, the Court said:

> "The petition of the creditor Rawle does not disclose any right on his part to intervene; it shows that he was a simple contract creditor, holding obligations against the company; but it does not show that any portion of them was secured by any lien upon the mortgaged premises. His intervention is only an attempt of one creditor to prevent another creditor obtaining judgment against the common debtor—a proceeding which can find no support, either in principle or authority. The interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter of litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. * * * *

"The petition of Shaffer and others stands upon a different footing. It shows that they were judgment creditors having liens, by their several judgments, upon the mortgaged premises, at the time of the institution of the present suit. As such, they were subsequent incumbrancers and necessary parties to a complete adjustment of all interests in the mortgaged premises, though not indispensable parties to a decree determining the rights of the other parties as between themselves. For such adjustment the Court would have been justified in ordering them to be brought in, either upon their own petition, as in the present case, or by an amendment to the complaint. Sargent v. Wilson, 5 Cal. 504; Moss v. Warner, 10 Id. 296; Montgomery v. Tutt, 11 Id. 307."

Also see note in the annotations citing numerous authorities.

In Thompson v. Huron Lbr. Co., (Wash.), 30 Pac. 741, the trustee endeavored to foreclose upon a mortgage and a receiver had been appointed and the corporation declared insolvent. The lower court allowed several unsecured general creditors to intervene and contest the mortgage. In this case, such simple contract creditors had a right to contest the mortgage under the local law relative to hindering, preferring and delaying creditors. The statute in Washington is similar to that of Idaho as to intervention, and the Court, however, held that such creditors had no right to intervene, saying as follows:

"Numerous other creditors of the Huron Lumber Company, who had not obtained judgments and had no liens, and were simple contract creditors, were allowed to file so-called interventions, and the cause was then kept waiting until they could sue at law and obtain judgments, when they came in again and filed supplemental complaints. This, under the statute and the authorities, was wholly irregular. Under a statute exactly like ours, the Supreme Court of California, in the leading case of Horn v. Volcano, 13 Cal. 62, held that a simple contract creditor of a common debtor could not intervene in a foreclosure suit. Our statute also provides that no intervention shall be cause for delay in the trial of an action between the original parties. Sec. 157. Intervention, as we have it, is a peculiar proceeding, and should not be extended so as to take the place of equity suits, which furnish ample remedy in most cases. The error committed is not, however, available to the appellant, excepting in the disposition of the case made hereafter."

In the note to Brown v. Saul, 16 Am. Dec. 175, the authorities on this question are also collected. To the same effect see Lecroix v. Menard, 14 Am. Dec. 161 (La.) and note; Clapp & Co. v. Phillips & Co., 92 Am. Dec. 545 (La.); Kansas C. P. Ry. Co. v. Fitzgerald (Neb.), 49 N. W. 1100; Bray v. Booker, (N. D.) 72 N. W. 933; Smith v. George T. Smith Mfg. Co., (Mich.); Yetzer v. Young, (S. D.) 52 N. W. 1054.

So in Murray v. American Surety Co. of New York, 70 Fed. 341, the Court said:

"It is equally clear that neither the bank commissioners nor the creditors of the bank had any right of intervention in the proceedings instituted under the provisions of sec. 11 of the bank commissioners' act, for the purpose of enjoining the bank from transacting business. Neither the bank commissioners nor the creditors could have instituted such a proceeding. That authority is vested solely in the people of the state. To entitle the bank commissioners or the creditors to intervene, by motion or petition, *their interests must be such that, if they had brought the original proceedings in their own name, they would have been entitled to recover.* Pom. Rem. & Rem. Rights, sec. 430. (Our italics.)

"In Horn v. Water Co., 13 Cal. 69, Field, J., said:

" 'The interest mentioned in the statute, which entitled a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. * * * To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, which is the subject of litigation.'

"See also Smith v. Gale, 144 U. S. 518, 12 Sup. Ct. 674."

The trial court cites and quotes in support of its decision portions of the case of Ruggles v. Cannedy, (Calif.) 53 Pac. 912, in which case the Court quotes from Roan v. Winn, 93 Mo. 503. The California case has no application to the one at bar. It is a case under the local insolvency law.

Sec. 3440 of the Civil Code of California declares that a transfer of or lien upon personal property may be voided at the instance of a creditor or of him upon whom the estate of the debtor devolves in trust. The Court, after stating that although in sec. 2957, relative to the effect of chattel mortgages as against creditors, the clause as to successors in interest or trustees is not included, says:

> "We do not regard the omission in sec. 2957 of the Civil Code to declare that those upon whom the estate of the debtor may devolve in trust have the right to void the mortgage, as being at all important."

And, after citing several authorities and distinguishing between an assignee for the benefit of creditors and an assignee under the local insolvency statute, the Court says:

> "*It is determined, therefore, in this state that the powers of the assignee in the premises are not limited to cases of fraud in fact.*"

The decision rested entirely upon the local statute.

The Court continues:

> "But, independent of these reasons, there is still another consideration by which such an action as this upon the part of the assignee in in-

solvency is justified and upheld. By sections 18 and 21 of the insolvent act, all of the estate of the insolvent passes to the assignee. As is said in Brown v. Bank, *supra*, 'the assignee has the right to sue for and recover everything due to the estate for the benefit of the creditors.' *While, as between the assignor and his vendee or mortgagee, the transaction is valid, as between him and his creditors it is void, and the title still remains in him. This title passes to the assignee in insolvency for the benefit of the creditors, and justified him in maintaining an action in their behalf to reduce the property to possession.* 'The statute provides for the assignment of property by insolvents, to the end that it may be appropriated to the payment of debts. It authorizes proceedings to subject the property of debtors to the payment of their debts. As between the creditors and the debtor who fraudulently conveys property to defeat them, he is regarded as holding the title to or an interest in the property conveyed, and it may for that reason be made subject to his debts. If he holds no such interest, the law will not permit the creditors to appropriate the property, for it would not suffer the property of another to be taken for his debts. It thus appears that the debtor did hold as to the creditors an interest in the property, and that it passed to the assignee. It is said that the assignee takes the derivative title from the debtor, and stands in his shoes. This is correct so far as persons other than creditors are concerned. As we have seen,

as to creditors the assignee is regarded by law as holding an interest in and title to the land." (Our italics.)

The case of Roan v. Winn, 93 Mo. 503, also arose under and was decided entirely upon the local statute. The Court in effect said that it is a rule so well established as not to require the citation of authority in support of it, that before a creditor can proceed in equity to have a deed, made in fraud of creditors of the grantor, set aside and the property subjected to the payment of his debt, he must first have his lien established at law, and while the plaintiff did not sue and get a judgment, the assignee in insolvency adjusted his claim and gave a certificate therefor, which adjudication under sec. 376 of the Rev. Stats. of Missouri is, so far as its finality is concerned, the same as a judgment. Moreover, in this case the Court said that the assignee stood in the shoes of the assignor and could not set aside any conveyance, valid as against the assignor and allow the creditors to secure their judgments by proving their claims.

The statute referred to in this case was construed in the case of Eppright v. Kauffman, 90 Mo. 25. In discussing sec. 279, Rev. Stats., the Court said:

"These statutory provisions are too plain to require extended comment. When the assignee passes on a claim and allows it, the question involved therein becomes *res adjudicata* and the decision of the assignee is final; in a word, a judgment having all the force and conclusive attributes of any other judgment."

Neither the California nor the Missouri cases cited by the learned District Judge sustain his decision for they rested upon the peculiar statutes of those states as construed by the local courts and they were quite the reverse of the Idaho statutes as construed by the Idaho Supreme Court.

As stated before, there are many cases where the local insolvency statutes gives the creditors or assignees either greater or lesser rights, but these cases would be as inapplicable as those cited by the Trial Court.

Even in California where the question of the rights of the receiver in suits other than insolvency proceedings under the state law, the Court has held differently.

In Pacific Ry. Co. v. Wade, 27 Pac. 769, where a receiver was appointed at the instance of a judgment creditor, the Court said: "The property of the cable company is in *custodia legis*. The receiver is indifferent between the parties. His possession is the possession of the Court for the benefit of all persons interested whether named as parties in the action or not, and cannot be disturbed without the consent of the Court."

And in the case of Garniss v. Superior Court of San Francisco, 26 Pac. 351, being a case where a receiver had been appointed in an ejectment suit, the Court said:

> "Though a receiver may be and generally is appointed on the application of one of the parties interested in the property which he is to preserve,

his holding is not merely for the benefit of such party or of any other party. It is the holding of the Court for the equal benefit of all persons who may be finally adjudged by the Court to have rights in it. Where, however, the rights of the parties are established, he is considered as holding for the benefit of the parties entitled to the property."

Beach, Receivers, sec. 252.

In the case of William Von Roun v. Superior Court of San Francisco, 58 Cal. 358, it appeared that prior to the appointment of an assignee in the insolvency proceedings a receiver had been appointed, and the Court says:

"It seems to be the impression of the counsel of the applicants for the writ, that they have a lien acquired by virtue of the levy of the writ of attachment on the property seized, which will be lost if the property is turned over to the Receiver. This is an entire misapprehension of the law. *The appointment of a receiver works no injury to the least right of any one.* It would be strange if it did. *The receiver is the hand of the law, and the law conserves and enforces rights—never destroys them. His appointment determines no right, and in no way affects the title of any party to the property in litigation.* This was so determined in Coburn v. Ames, 52 Cal. 385; see also Willink v. Morris Canal & Banking Co., 3 Green Ch. 377; Matter of Colvin, 3 Md. Ch. Decisions, 278-302; Chase's Case, 1 Bland, 206, 213; s. c.

17 Am. Dec. 277; Beverly v. Brooke, 4 Gratt, 187, 208; Skip v. Harwood, 3 Atk. 564; 2 Wait's Pr. 203. *If the applicants have any lien, the receiver holds the property subject to such lien, as fully as did the sheriff; and if such property is sold by the receiver, whatever lien exists attaches to the proceeds.* (High on Receivers, sec. 138; In re N. A. G. P. Co., 17 How. Pr. 549; Hall v. Merrill, 9 Abb. Pr. 121; Rich v. Loutrel, 18 How. Pr. 121.)" (Our italics.)

These cases merely go to show that where the local insolvency statutes are not involved, the general rule for which we contend is followed. The cases heretofore cited to the effect that general creditors cannot under the statutes of Idaho intervene and contest the lien of the Trustee, are based upon the theory that they have no such interest as to entitle them to intervene. In no event, however, should an intervention have been allowed where they were already represented in the foreclosure suit by a receiver. If they had acquired information that would defeat the lien of the mortgage and desired therefor to contest the mortgage, their duty was plain—they should have applied to the receiver to make the contest in his representative capacity, and furnished him the evidence in their possession. Clearly, however, to have done this would have meant an equitable and pro rata distribution among all creditors, including the Trustee, to the extent of his deficiency, of the assets that the Receiver might have been able to wrest from the secured creditors.

In Sands v. Greeley & Co., 80 Fed. 195, the question arose as to whether or not certain creditors had a right to intervene, the Court saying:

> "This Court is also chary as to allowing intervention by persons interested in the funds of a receivership. It does not grant such relief when all the rights of the parties applying may be conserved without it. Intervention implies the making of a new and independent party to the litigation with an independent attorney, and in many cases an independent counsel. *The Court held that intervention by persons interested in the funds would not be permitted if their rights could be conserved without it*, since such interventions multiply the number of litigants, and if begun in the case of one creditor cannot be consistently denied as to others, thereby resulting in unnecessary expense and confusion of proceedings."

We believe it needless, however, to cite further authorities to the effect that the Receiver is the proper party to enforce the rights of the creditors and that such creditors should not be allowed to intervene unless it appears that the Receiver refuses to enforce their rights or fails to do so properly. In this case, there is no showing that the Receiver at any time refused to enforce the rights of any creditor, and, as appears from the decision of the trial court, the Receiver at all times made the same objections as the intervening creditors.

In some cases arising in Pennsylvania and Missouri, construction has been given to the statutes

relative to the avoidance of chattel mortgages that is quite at variance with the settled construction of the Idaho statute.

In the case of the First Nat. Bank v. Connett, 5 L. R. A. (N. S.) 148, 142 Fed. 33, the Court said:

> "Such a mortgage is also utterly void as to simple contract creditors who extended credit after it was given and who have secured no title, by lien preference, execution, attachment, or otherwise. As to them, the subsequent recording of the instrument is of no effect. It cannot be asserted against the enforcement of their demands.'

And in Landis v. McDonald, 88 Mo. App. 335, where the mortgage was unrecorded, but the mortgagee took possession prior to any lien of a creditor attaching to the property, but after the debt of the creditor had accrued, the Court held that such creditor could nevertheless avoid the mortgage.

And in Pennsylvania, it was held in Brunswick & Balke Co. v. Hoover, 95 Pa. St. 508, and Forest v. Nelson, 108 Pa. St. 481, that general creditors could attack an unrecorded conditional bill of sale, and that a receiver for such creditors had the same right.

Manifestly, cases from these jurisdictions can have no application, in the light of local statutes and decisions, to the case at bar.

It must be admitted that all the creditors at the time of the appointment of the Receiver had an interest in the property of the corporation. As against the corporation the property and assets of the cor-

poration constituted a trust fund to be administered according to the respective rights and priorities of all parties in interest. Where the statute of a state, or the decisions in the construction thereof, permit a general creditor to set aside a conveyance or incumbrance or bill of sale, the appointment of a receiver suspends that right, but surely such appointment does not divest him of such right for, as the lower Court said in quoting with approval from another Court: "It is manifest that it would utterly defeat the banking act if, after the suspension, the assets remain subject to levy, execution, or attachment, and, therefore, that the passing of the assets into the hands of the Receiver removes all the property of the bank from liability to process to secure satisfaction of judgments." The creditors' rights as they existed at the time they were suspended by such appointment can now be enforced by the Receiver. This is clearly distinguishable from the misapprehension that the trial court had to the effect that not only were his rights preserved but that by virtue of such appointment he acquired a different relation to the property and additional rights not previously enjoyed. If the trial court's view were correct, that a creditor who had no right to contest a chattel mortgage in the State of Idaho prior to the appointment of a Receiver, secured such a right by virtue of such appointment, the following situation might well occur: Sec. 4304, Rev. Codes of Idaho, provides for the posting and publication of notice where property is attached by virtue of writs issued from the state

courts and provides that "any creditor of the defendant, who, within sixty days after the first posting and publication of such notice, shall commence and prosecute to final judgment his action for his claim against the defendant, shall share pro rata with the attaching creditor in the proceeds of defendant's property where there is not sufficient to pay all judgments in full against him." As we have seen under the decisions of the State of Idaho, the intervening creditors in this case could not have contested this mortgage unless they had first secured a lien by attachment or other process. In order to place themselves in a position to contest the lien of the Trustee, they would have had to comply with the statute and permit *all the creditors of the Power Company who in compliance with the statute secured judgments likewise against the Power Company, within the time provided, to pro rate in the proceeds of the property.* This would have effected the same result as if the Court had held that the Receiver was entitled to contest the lien of the Trustee and to distribute the proceeds equitably and ratably among the creditors.

In either case, these general creditors would have had to pro rate with the other general creditors as well as with the Trustee, to the amount of its deficiency. Instead of that, however, a court of equity permits these favored creditors to circumvent the statute which requires equity and pro rating between attaching creditors. And it accomplishes the emasculation of the statute by appointing a receiver for the

"protection" of all creditors and interests; and then holds that such appointment deprives the creditors of the right to pro rate either under the statute or the principles governing the administration of the receivership suit. It may be well to cite a few jurisdictions in which the rule of the Federal Courts, and for which we contend, is followed where no local statutes qualify the same.

Woodland v. Wise, (Md.) 76 Atl. 503.

National State Bank v. Vigo County Natl. Bank, (Ind.) 40 N. E. 799.

Polk v. Johnson, (Ind.) 76 N. E. 634.

City Bank of Wheeling v. Bryan, 86 S. E. 8.

McClurg v. State Bindery, (S. D.) 53 N. W. 428.

Cramer v. Iler, 63 Kan. 579, 66 Pac. 617.

Sumner Iron Works v. Wolten, 61 Wash. 689, 112 Pac. 1108.

Ardmore Natl. Bank v. Briges Machinery Co., 20 Okla. 427, 94 Pac. 533.

In many of these cases, as well as those heretofore cited, the courts have discussed the question in a general way, and they have not always expressed the relation of the creditors to the property in the hands of the receiver with perfect accuracy. Nevertheless, the doctrine that runs through them all is entirely clear. It is true that these assets are a trust fund, as against the corporation, in which each creditor has a certain right or equity to be preserved by the receiver for his benefit.

In this case the general creditors Guy I. Towle, Carl J. Hahn, Jake M. Shank, and L. M. Plumer and E. B. Scull at the time of the appointment of the Receiver had no such right, equity or lien as to entitle them to contest the lien of the Trustee. This is clearly settled by the decisions of the Supreme Court of Idaho heretofore cited. Not having had such a right, the same could not be preserved or enforced by the Receiver.

We shall next consider whether a general creditors' suit can be made into a contrivance whereby the moving parties can obtain an advantage over other creditors, equally within protecting influence.

III.

Where the purpose and object of the suit wherein the Receiver is appointed and the prayer of the bill of complaint are for the appointment of a receiver to marshall the assets and hold and manage the same for the preservation and protection of every interest therein, no one creditor or class can by virtue of such appointment acquire a right to defeat another interest, unless he had such right prior to the appointment.

As stated heretofore, the Receivership suit was not commenced by Towle for the purpose of impounding any specific property for the satisfaction of any specific claim or interest. Towle prayed for no lien on behalf of himself or any other unsecured creditor. In his bill of complaint he asked the Court to fully protect and enforce the rights and equities of the complainant and *all other creditors* of the defendant

and other parties in interest (Rec., 169), and that the Court ascertain the rights of the complainant and *all other creditors* and fully administer the property and funds according to the respective liens and priorities existing therein. (Rec., 167, 168.)

As heretofore shown, even in the cases where the theory of the action and the purpose and object thereof are not so clearly and definitely set out, the general chancery receiver holds the property, and, in the administration of the trust, preserves and enforces the rights of all parties as of the date of his appointment. He does not impound any specific property for any certain interest; he does not sequester any assets for any creditor or class of creditors. *A fortiori*, then, is this true where the bill of complaint is clearly framed on the theory that the Receiver is to hold the property for the benefit of every interest therein, and that the assets be distributed equitably and in accordance with the respective rights and priorities of the various claimants as of the date of the appointment of the Receiver. As we have seen, under the laws of Idaho the general creditors Guy I. Towle, Carl J. Hahn, Jake M. Shank and L. M. Plumer and E. B. Scull had no such lien as to entitle them to contest the lien of the Trustee. Where the Receiver is a general chancery Receiver of a Federal Court, we have also seen that such creditors do not acquire any additional rights or lien by virtue of such appointment. *A fortiori*, then, in this case where there can be no doubt but that the Receiver was not appointed for the purpose of impounding or sequester-

ing the property of any creditor or class of creditors, but was to hold and administer the property according to the rights of all, at the date of his appointment, such creditors cannot by virtue of his appointment acquire rights that they did not previously have.

This principle is set forth most clearly in the case of Haehnlen v. Drayton, (C. C. A., 3rd circuit), 192 Fed. 300. The question there was whether by the appointment of a receiver the income was impounded for any specific party. Specifically, both the bondholders and judgment creditors claimed this income. The bill of complaint was practically identical, as appears from the case, with the facts and prayers of the one filed by Guy I. Towle in the Receivership suit here. The judgment creditor in his bill of complaint stated that he filed it on behalf of himself and all other creditors of the defendant corporation. The Court says:

> "The Court took possession of the assets of an admittedly insolvent corporation, not for the benefit of the complainant and the other judgment creditors named in the bill of complaint—the Court was not asked to do that—*but for and in behalf of all the creditors of the corporation, 'secured and unsecured'*. The complainant explicitly asks that his right and the rights of all the other creditors of the defendant company, 'both secured and unsecured', in and to the property of the said defendant company, may be ascertained and protected; that the Court would

administer the estate constituting the entire railway and property of the defendant, and for such purpose *marshal its assets and ascertain the respective liens and priorities existing upon each and every part of the said lines*, and the amounts due and the rights, liens and equities of each and all the creditors of said defendant company'. As already stated, the bill in no wise *attempts to impound the income for the benefit of the complainant and the other judgment creditors. Not only is no such request made, but no preference or priority is asserted in their behalf, as a class, or in behalf of the complainant as an individual.* Indeed, its whole framework and structure is utterly inconsistent with the claim now set up by them. At the outset of the bill, Drayton states, as already appears, that it was filed in his own behalf, and in behalf of all others in like interest, and later that he had recovered a judgment against the defendant corporation, and that was all he said in his own interest. Giving those statements their full force and disregarding any contravening allegations, it might well be doubted whether the bill could properly be construed to be a creditor's bill; but however that may be, and however strong the complainant's position was, he immediately abandoned, or at least waived it, by setting up facts and circumstances and praying for relief wholly inconsistent therewith. It is impossible to perceive how his present claim can be sustained. He nowhere asserts a claim

to the income or asks to have it impounded for his own benefit, but on the contrary for the benefit of all the creditors, 'secured and unsecured'. *Consequently, the filing of his bill did not amount to what has been called an 'equitable levy'. Indeed, the allegation of the bill to the effect that it was filed for himself and others in like interest, is directly contradicted by an allegation immediately preceding the prayers of the bill, wherein he states that it is filed 'in behalf of himself and all other creditors of the defendant corporation.'* " (Our italics.)

The Court then distinguishes and quotes with approval the decision of the Supreme Court of the United States in Sage v. Memphis & L. R. R. Co., 125 U. S. 361, 31 L. ed. 694, stating that in that case the judgment creditor who filed the bill applying for a receiver was entitled to the income derived from the operation of the road by the receiver, quoting Mr. Justice Harlan as follows:

"It is true also that Sage did not sue in behalf of all the creditors of the company or of such as might come in and contribute to the expense of the litigation. He was not bound to pursue that course. It was his privilege under the law to sue for his own benefit, and it was within the power of the Court for his protection as a judgment creditor, to place the property of the debtor company in the hands of a receiver for administration under its orders.

"But we do not perceive any legal ground upon

which they are entitled to the net earnings of the property, while it was in the hands of the receiver in a suit instituted by a judgment creditor for the protection of his own interests, and not of the interests of the trustees, or of the bondholders, or of other creditors. His suit was in effect an equitable levy for his benefit upon the net income of the property."

The Court also cites with approval the case of Seibert v. Minneapolis & St. L. Ry. Co., 52 Minn. 246, 53 N. W. 1151, which case also distinguished the case of Sage v. R. R. Co., *supra*, saying:

"The purpose of that action was only to satisfy the plaintiff's claim, and for that purpose the receiver was appointed and the income was earned; but the purpose of this action is, in part at least, to adjust the rights of all the parties, as well to the income as to the body of the property. For the purpose of adjusting their rights to the income, it was necessary for the Court to lay hold upon, not merely that portion which the plaintiff might be entitled to, but that which all the parties were entitled to. The order appointing the receiver not assuming to appropriate it to plaintiff, the Court was to be regarded as taking and holding it for all the parties, as their rights and interests might appear, at least so long as none of them made objection."

"See also Union Trust Co. v. Illinois Midland Ry. Co. et al., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963."

Mr. Justice Harlan, in Sage v. Memphis & L. R. R. Co., further said:

> "But we do not perceive any legal ground upon which they are entitled to the net earnings of the property, while it was in the hands of the receiver, in a suit instituted by a judgment creditor *for the protection of his own interests, and not of the interests of the trustees, or of the bondholders, or of other creditors.* His suit was, in effect, an equitable levy for his benefit, upon the net income of the property." (Our italics.)

Another case that sets forth concisely the nature of the suit commenced by Guy I. Towle, is Hancock v. Wooten, 11 L. R. A. 466. This was a case arising in North Carolina. The Court, speaking in reference to the rights of a certain party to share in a certain receivership suit, said:

> "In order to determine this point, it is necessary to consider the true character of this action. It is claimed that it is in the nature of a creditors' bill and that in such actions all creditors may, at any time before final decree, be allowed to come in and prove their claims. Undoubtedly, such is an incident of what is ordinarily called a 'general creditors' bill'. Such bills are usually instituted for the purpose of winding up the insolvent estates of deceased persons or the affairs of a corporation. These may be illustrated by the cases of Pegram v. Armstrong, 82 N. C. 326; Wordsworth v. Davis, 75 N. C. 159; Long v. Bank of Yaceyville, 81 N. C. 41; Glenn v. Farm-

ers Bank, 80 N. C. 97; Dobson v. Simonton, 93 N. C. 268. In such cases there are many parties standing in the same situation as to their rights or claims upon a particular estate or fund, and the shares of a part cannot be determined until the rights of all the others are settled or ascertained. Of this nature, also, are bills brought to enforce trusts or assignments for creditors, and other instances where there is a community of interest, or where the law devolves upon the Court the duty of taking a fund into its custody, and distributing it according to the respective interests of the parties. *In such cases, no priority can be acquired by one party suing or making himself a party before the others; and, perhaps one who has vainly endeavored to defeat the purposes of the action may, upon proper terms, be allowed his share in the fund. Such creditors' bills, however, are totally different from those instituted by an unsecured creditor* (*or several creditors* if they choose to unite) against a living debtor. Here the field is open to all, and he who first secures a priority shall reap the reward of his diligence. Such bills are often said to be in the nature of an equitable *fi. fa.* or equitable levy (Bispham, Eq., sec. 528), and under them the vigilant creditor may acquire a priority as he does when he pursues the analogous remedy of execution at law. Bills of this kind are called 'judgment creditors' bills' (see Harv. Law Rev. Oct. 1890), and are so familiar in our practice

that it is hardly necessary to illustrate them by a reference to actual cases. They were entertained in equity for the purpose of subjecting equitable and other interests which could not be reached and sold under execution, and also for the purpose of removing obstructions to legal remedies, as by setting aside fraudulent conveyances and the like." (Our italics.)

And so in this case, no priority was sought or acquired by the party suing or intervening before the others. Here it was clearly the duty of the Court to take the fund into custody and distribute it according to the respective interests of the parties. The right of any one party cannot be determined nor can he be paid until the rights of all the others are settled and ascertained. We shall later discuss more fully the right of the Court to pay in full these favored creditors prior to ascertaining the rights of other creditors and prior to entering the deficiency judgment of the Trustee. Had this case been one, as stated by the Court in the case last quoted from, where the field was open to all—where the first who secures priority shall reap the reward of his diligence—the situation would be quite different. And such a case is sometimes entertained in equity for the purpose of subjecting and impounding certain interests for the satisfaction of a certain claim; clearly, such a case is in the nature of an attachment. But where, as in this case, the Receiver was appointed for the purpose of administering the assets and preserving and enforcing the rights of *all* parties

and in accordance with the relation that such parties had at the time of the appointment of the Receiver, certainly no one creditor or class of creditors acquires, by virtue of the appointment of the Receiver, any rights in any property in addition to the ones that he had.

IV.

The rule governing the administration of assets in a general creditors' suit is substantially the same as under the Bankruptcy Act before the recent amendment.

Prior to the 1910 amendment of the National Bankruptcy Act, although the Trustee could enforce and was vested with the rights of the creditors, he clearly, in the absence of specific statutory authority, had no greater rights than did the creditors he represented. The same statements relative to the effect of receivership proceedings are used when speaking of proceedings in bankruptcy; that is, proceedings in bankruptcy, commenced by one or more creditors of the bankrupt for the benefit of all, are in the nature of an equitable attachment against the estate of the bankrupt. (Cases citing in re Hinds, Fed. Cas. 6516.) The assets in the hands of the Trustee are said to be held in trust for the creditors, as in receivership proceedings, and the trustee, like the receiver, represents all the creditors.

In Board of County Commissioners v. Hurley, 169 Fed. 92, the Court said:

> " * * * * On that date the property of the bankrupt passes from his control to the Court

or to its receiver, and thence to the trustee in trust for the creditors of the bankrupt in proportion to the amounts of their claims at that time. On that date there vests in each creditor as *cestui que trust* an equitable estate in such a part of the property of the bankrupt as the amount of his provable claim at that time bears to the entire amount of the provable claims against the estate. On that date the bankrupt law deprives a creditor of all his common law remedies to collect his debt out of the property of his debtor and to collect subsequent interest on his claim against that property, and gives him in lieu thereof this equitable estate in the property of the bankrupt."

It was settled law that prior to the amendment of 1910 the trustee in bankruptcy had no greater rights than those of the creditors that he represented. By the amendment of 1910 the Trustee was deemed vested with all the rights, remedies and powers of a creditor, holding a lien by legal or equitable proceedings; and as to all property not in custody of the bankrupt Court, he was deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. This rule is probably best stated in the case of In Re New York Economical Printing Co., 110 Fed. 514, 49 C. C. A. 133, where the Court said:

"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors, at the time when the trustee's title ac-

crues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee; and if it is one which was invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor. The provisions which have been quoted do not necessarily touch a lien which at the date of the adjudication of bankruptcy was valid as to the bankrupt, and could not then be disturbed by any of his creditors."

In the case of In Re Collins, Fed. Cas. No. 3007, the Court said:

"I think the position is a sound one, that the assignee represents the creditors, and that he is authorized and is bound to protect their interests. In the instance of a fraudulent conveyance, where, by his participation in the fraud, the debtor has lost the right to attack the conveyance, I do not doubt the power of the assignee, as representing creditors, to attack it, wherever creditors could do so. The difficulty here is, that the creditor has no such right. Has the assignee any other or greater rights than the creditor? The New York statute declares the mortgage, unless filed, to be void as against the creditors of the

mortgagor, and as against subsequent purchasers and mortgagees in good faith. The creditors spoken of have been shown to be those having judgments and executions. Subsequent purchasers or mortgagees in good faith are those who pay or advance their money upon the security of the property, without knowledge of the previous encumbrance. Thompson v. Van Vechten, 27 N. Y. 581, Van Heusen v. Radcliff, 17 N. Y. 580. The assignee cannot claim to hold either of these positions. So far as it is obtained from state laws, the assignee would seem to have no power to attack the mortgage. He does not represent a judgment and execution, or a purchaser or mortgagee in good faith. * * * *

"I do not perceive how the transfer from the bankrupt to the assignee relieves from the necessity of obtaining that specific lien upon the property which is needed to authorize an attack upon the mortgage. The New York Reports are full of cases to the effect, that a simple debt, or a judgment even, will not justify a bill to set aside, as fraudulent, a conveyance of real estate. The creditor must first have a deed or mortgage from the debtor, a sheriff's certificate of sale on execution, or some equivalent right giving a claim upon the specific property conveyed."

This question was firmly settled by the Supreme Court of the United States in York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 785. Although that case came up from the State of Ohio, the doctrine estab-

lished by the decisions of the State of Ohio as to rights of property acquired by a receiver appointed in that state was clearly distinguished in Kansas City Equipment Co. v. Degnan, (6th Circuit), 184 Fed. 834, 106 C. C. A. 158, where the Court said:

> "The contention, then, that the receiver in the present case is in a better position than that accorded to a trustee in bankruptcy is not tenable because the feature of the decision in York Mfg. Co. v. Cassell, 201 U. S. 353, 50 L. ed. 782, which holds that bankruptcy does not operate as an attachment or lien in favor of creditors has not either in terms or principle any relation to the rule prevailing in Ohio as to the effect of a receivership upon the rights of creditors. * * * * In our judgment, this is but applying a settled rule in Ohio touching the point of the appointment of a receiver and a seizure made through him."

The trial court in the case of In Re Lane Lbr. Co., 210 Fed. 82, passed on the identical question as to the right of a trustee prior to the amendment of 1910 to set aside a conveyance or encumbrance which could not have been set aside by those represented by him. The Court said:

> "Prior to the amendment of sec. 47, it was quite generally held that a trustee in bankruptcy could not, upon behalf of general creditors, assail the validity of such an instrument, because such creditors, having no specific lien upon the property, were in no position to make the attack, and there-

fore the trustee, acting upon their behalf, could assert no better right. In re Economical Printing Co., 110 Fed. 514, 49 C. C. A. 113, Remington on Bankruptcy, secs. 1207½ to 1210, the amendment meets this emergency by conferring upon him the status of a creditor who has such lien and may therefore object to the assertion of a lien under an unrecorded mortgage."

V.

The rule in general creditors' suits is also substantially the same as the rule under the acts of June 3, 1864, *and June* 30, 1876, *providing for receivers of insolvent national banks and the sequestration of the property and assets thereof for the redemption of circulating notes and the payment of the debts of creditors, the appointment of the receiver in no way affects the rights of any creditor.*

It will be noted that the trial court quotes Judge Taft in the case of Chemical Natl. Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155. The trial court, however, uses the excerpts quoted from Judge Taft to support a proposition diametrically opposed to that contended for by Judge Taft. After the quotation mentioned by the trial court, Judge Taft says:

"The national banking act is framed *to secure equality of distribution among the creditors as far as is consistent with the previous contract right of those creditors.* If one creditor secured collateral for his loan when made that produced an inequality between him and the other creditors who have no collateral, which it cannot have been

> the purpose of the banking act in its provisions for winding up the insolvent bank to modify, reduce or defeat."

Judge Taft, admitting that the appointment of the receiver was a sequestration and seizure of the assets of the bank on behalf of all creditors, nevertheless says:

> "The suspension of the bank and its seizure by order of the comptroller have no effect to change the right of the creditor with reference to its collateral. He enjoys precisely the same advantage over the unsecured creditor with respect to the collateral that he did before the suspension. With reference to obtaining satisfaction out of the general assets of the bank before suspension, their rights were equal. So must their rights be after the sequestration of the assets for ratable distribution."

This case was followed by the Court in Commercial and Savings Bank v. Robert H. Jenks Lbr. Co., 194 Fed. 739, where a number of other cases are cited to the same point.

The principle stated by Judge Taft to the effect that the appointment of a receiver should not operate to change the status of the two classes of creditors, one secured and the other unsecured, in their relation to each other, or to the property sequestered for their benefit, was announced by the trial court itself in the case of Westinghouse Electric & Mfg. Co. v. Idaho Ry. L. & P. Co., 228 Fed. 972. In this case a receiver had been appointed at the instance of a

creditor and the question was whether or not the trustee who thereafter foreclosed upon its mortgage could share in the income during the receivership pro rata with the other creditors to the extent of its deficiency. The immediate question was whether or not the Trustee could share or pro rate on the basis of its whole claim filed in the receivership suit, or whether it could merely share on the basis of its deficiency. The trial court held that the trustee had a right to pro rate as a general creditor in the assets of the Power Company, not subject to or impounded for the benefit of its lien, to the extent of its deficiency and on the basis of its deficiency. In that case a receiver had been appointed in a general creditors' suit, as in the case at bar, and there was no effort made to impound the income for the special benefit of either the Trustee or any other creditor. The Court based its decision on the ground that the appointment of the receiver did not operate to the special advantage of any creditor or party, and that to hold that the trustee had a right to share on the basis of his whole claim would mean that the receivership operated to his advantage and to the disadvantage of the unsecured creditors. The Court quotes Judge Taft at length, and then says:

> "I have quoted at unusual length in order to disclose fully the basis and import of the reasoning by which the rule is supported. *In substance it is that the appointment of a receiver should not operate to change the status of the two classes of creditors, one secured and the other unsecured, in*

their relation either to the estate or to each other; that but for the receivership the collateral holder would have had the right to sue and satisfy his debt by levy and execution against the entire property, regardless of his collateral; and that *he cannot justly be deprived of that right to his disadvantage, and to the advantage of the unsecured creditor, by the institution of the receivership.* Now, if he adopt this course of reasoning in the instant case, what is the result? The trustee here held a claim secured by mortgage. The property mortgaged is situate in Idaho, and the mortgage contract is therefore to be adjudged by the local law. By section 4520 of the Revised Statutes of Idaho it is provided that: 'There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property.' Any such action is defined to be a foreclosure suit. In such suit, after sale, but not until after sale, the plaintiff may have personal judgment, which, and which only, he may satisfy by levy and execution. Such being the law, to hold that the trustee here may receive a dividend upon its entire claim and hold its security in reserve for the satisfaction of the balance, if any, remaining unpaid, is manifestly to reverse the statutory order, and it would be to do just what in the Armstrong case was held could not justly be done, *for thus the receivership would operate to alter the relation of the two classes of creditors, to the advantage of the secured creditor and to the disadvantage of the*

unsecured. Had not the receiver been appointed, the unsecured creditor could have passed his claim to judgment and satisfied the same by levy and execution; but this the trustee could not have done, for it was without such remedy until it had exhausted its security, and then it could levy, not for the full amount of its original claim, but only for such deficit as remained unpaid. The equivalent of the remedy which was thus available to it without a receivership is, under the circumstances, the recognition of this deficit, and that only, as the basis of a ratable distribution, and this is the rule which will be followed." (Our italics.)

The reasoning of the Court on the effect of the receivership on the relation of the creditors to each other and to the assets of the estate is not only sound but it is in harmony with the great weight of authority on the subject, and we cannot understand why the learned District Judge did not follow it in the case at bar. His failure to do so seems clearly reversible error.

We next pass to a consideration of the proposition that if either the Receiver or the creditors who had invoked the jurisdiction of the Receivership suit were entitled to contest the validity of the mortgage, the assets recovered should be turned over to the Receiver for administration and distribution in the general creditors' suit for the pro rata benefit of all creditors, including the Trustee on its claim for deficiency.

VI.

Even if the creditors had a right under the State statutes and decisions to contest the lien of the Trustee, or if the Receiver as their representative or by virtue of the rights conferred upon him for their benefit by special statutes or decisions had such a right, any assets or property so taken from under the lien of the Trustee would in any event be the assets of the debtor Power Company to be distributed in the Receivership suit for the benefit of all creditors according to their respective rights and priorities.

The Trial Court in effect held that certain general creditors who had no lien at the time of the appointment of the Receiver, acquired, by virtue of such appointment, a lien by which they could defeat the very purpose of the suit in which the Receiver was appointed. The Trial Court seemingly misapprehended the nature of the Receivership suit and utterly disregarded the very purpose for which it was brought and the principles upon which it was based.

It must be conceded that some confusion arises because of the failure of some Courts to distinguish between suits brought by judgment creditors and receivership suits such as the one at bar. In what is known as a judgment creditors' suit the field is open and the swift and vigilant are rewarded for their diligence by a preference and priority, but the very purpose of a receivership suit such as the one at bar, and the basis for the jurisdiction of a court of equity in such a suit, is to prevent such a situation. The prize is in a court of equity. It is brought there

to prevent its depreciation and destruction. The diligent and swift are prevented from securing priorities and preferences, and the property is preserved and held by the Court to prevent a situation such as the one that we find in a judgment creditor's suit. The very purpose of bringing the property into a court of equity is to prevent its being torn asunder and destroyed by the efforts of creditors to secure preferences and priorities. Clearly, there is nothing inconsistent in this theory with the principles we have set forth above. The assets are taken by the Court for equitable distribution according to the respective rights and priorities of every party. If any one creditor had a lien at the time of the appointment of the Receiver, then clearly, whether the Court allows him or the Receiver on his behalf, to enforce that lien or the rights based upon such a lien, the result is clearly consistent with an equitable distribution; and subject to these prior liens all other assets of the Power Company are distributed ratably, for, as has been said repeatedly, equality is equity, and when the assets are in the Court for equitable distribution, in the absence of a lien existing upon the property at the time of its sequestration, it will be distributed pro rata among the general creditors.

Upon what theory can a court of equity confer a lien upon a general creditor in such a suit by the appointment of a receiver for the benefit of all? There is no answer in either law or equity to this question. It is the arbitrary exercise of power under the disguise of judicial discretion in determining

the relative equities of the parties. The action or decision of the Court below was the very opposite of what it set out to do or accomplish by the Receivership suit. It defeats the other creditors to whom the Court had given assurances of protection and from whom it had by its injunctive orders withdrawn the right of attachment and self protection.

It is conceded that the creditors who were paid in full were general creditors and stood upon the same footing as all of the general creditors in the Receivership suit. Clearly, as such, any property that was part of the estate for the administration of which the Receiver was appointed, and upon which there was no prior lien, should have been brought into the Receivership suit in order that it might be equitably distributed among all creditors. If any one of them, as a general creditor, was allowed by the court of equity to go out and secure certain property of the debtor not subject to any prior lien and apply it to his claim in full, the very purpose of the suit would be defeated. In order to prevent such a situation and to prevent such a creditor from receiving a preference to which he was not entitled, clearly the Receiver in such a case is the proper party to make the contest and to bring the property into the Receivership suit for equitable distribution.

We have seen that the same situation arises in cases of insolvent national banks. All assets not subject to prior liens are ratably distributed among the general creditors; and, as was said by the Court in Stewart v. Hayden, 72 Fed. 402, "after this bank had

failed and this receiver had been appointed, *he was the proper party to and the only party who could maintain his suit on behalf of the creditors* of this bank to set aside a fraudulent transfer referred to in the bill and to enforce the individual liability of Stewart. Hayden v. Thompson, 17 C. C. A. 592, 71 Fed. 60, and cases cited; Bailey v. Mosher, 11 C. C. A. 304, 63 Fed. 488, 491; Bank v. Colby, 21 Wall. 609; Hornor v. Henning, 93 U. S. 228; Stevens v. Oberstoltz, 43 Fed. 771; Bank v. Peters, 44 Fed. 13. *These propositions are too well settled to warrant more extended notice than their statement.*" (Our italics.)

There is absolutely nothing in the record to show that the Receiver refused to act on behalf of any creditor; there is nothing in the record to show that the Receiver was ever requested to act and neglected or refused. It does appear, however, that the Receiver was in Court; that the very Court which appointed him ordered him to answer in the foreclosure suit, and that he prayed the Court to be given all proper relief and that only so much of the property of the Power Company be sold as was covered by the lien of the Trustee. It does not appear that the Receiver knew the facts set up in the pleadings by the interveners in the foreclosure suit prior to the time that the case was set for trial, but it does appear that at least when these facts came out at the trial of the case, the Receiver on behalf of all general creditors did not refuse or neglect to set up these facts but made the same objections to the lien of the Trustee as did the intervening creditors. The Court recognized that the Receiver was, on behalf of the cred-

itors represented by him, making the same objections to the lien of the Trustee as were the intervening creditors. The Court says (Rec., 181): "By intervening creditors and by the Receiver it is urged that as to personal property which the instrument purports to cover, it is void. * * * * *" The Receiver was absolutely under the control of the Court. He could do no more than set up the same defense as that set up by the intervening creditors. The Receiver being in Court, the facts being admitted, and the only question being one of law, he was there claiming and ready to retain any property of the Power Company not subject to a prior lien, for the purpose of administering it in the Receivership suit equitably and ratably among the general creditors. As was held in Perry v. Godbe, 82 Fed. 141, the receiver's petition there was not subject to dismissal, because no evidence was introduced. He could rely upon the insufficiency of the proof introduced by the plaintiff. He had been appointed by the very Court before which he was now making the same objections as certain general creditors. As the officer of the Court appointed on behalf of the creditors of the Power Company, it was his duty to claim and retain possession of all assets of the Power Company not subject to a prior lien. It was equally the duty of the Court, if it should decide that certain personal property was not subject to the prior lien of the Trustee, to turn the same over and direct the Receiver to take possession of the same for the purpose of equitably administering and distributing the same in the Receivership suit.

Probably no one fact shows more clearly the anomalous situation than the fact that one general creditor, Carl J. Hahn, had not set up, in his answer, the defense relative to the filing and execution of the mortgage as a chattel mortgage, and that the only ground upon which the Court could possibly have given such a creditor the relief granted was either by virtue of the defense set up in his behalf by the Receiver, or because it was not necessary for a defendant to specifically plead the failure to file as a chattel mortgage.

We have already cited many authorities to the effect that mere general creditors cannot be permitted to intervene in foreclosure suits, unless they have a lien upon the mortgaged property, or an interest therein. This rule is conceded by the learned trial judge but he evolves a theory of his own for circumventing the statute and the decisions of the Idaho Courts by holding that by his action in appointing a Receiver these favored creditors acquired something in the nature of a lien which entitles them to intervene and to be paid in full even to the exclusion of all other creditors, whether secured or general. The Trial Court cites a case arising under the national banking acts to the effect that each creditor has an interest in the fund sequestered for the benefit of all. But even in such a case, surely it must be clear that the interest of any one creditor in the general assets of the debtor is merely a right to a pro rata share. It would be fundamentally opposed to the very purpose of the receivership suit to say that by virtue of the appointment of a receiver any one creditor ac-

quired such an interest as to entitle him to be paid in full when by such payment the other general creditors, standing upon the same footing, would receive nothing, or less than what would otherwise be their pro rata share. This principle is equally clear and settled, whether the proceeding be one in chancery, in bankruptcy, or under the national banking acts.

Judge Morrow, in Clark v. Bacorn, 116 Fed. 617, well states the rule as follows:

> "It is well settled that when a corporation becomes insolvent and the corporate assets have passed into the hands of a Receiver, such assets *constitute a fund for ratable distribution among its creditors; and no creditor can, by suit commenced or by judgment recovered after the commencement of the proceedings to secure the appointment of a Receiver, secure a lien upon the corporate assets that will entitle such creditor to priority of payment.*" (Our italics.)

And the case at bar is clearly distinguishable from a case where the creditor, under local law or under the general law, had a lien prior to the appointment of the Receiver which either he or the Receiver in his behalf could enforce thereafter. Here the Court clearly bases its decision not upon a lien recognized by the laws of the State, but upon a supposed lien arising from or created by the appointment of a Receiver for the benefit of *all* creditors.

A similar question arises in those jurisdictions where a creditor or an administrator on behalf of the creditors is permitted to set aside a fraudulent con-

veyance or encumbrance made by the decedent. If the administrator sets aside such instrument, the assets recovered are to be distributed in the administration of the estate, and if there are not sufficient assets to pay all the creditors, then each will receive but a pro rata share unless priority or preference previously existed. In several jurisdictions a creditor is permitted to set aside a fraudulent conveyance, but the assets recovered by such creditor clearly cannot be applied to his claim to the exclusion of all other creditors who are on an equality with him. Such creditor must turn the property over to the administrator to be equitably and ratably distributed in the administration of the estate. Typical cases of this character are Bottorf v. Covert, 90 Ind. 508; Rains v. Rainey, 30 Tenn. 261.

The error of the Trial Court must have arisen from failure to distinguish between a suit, the purpose of which is the levying upon and impounding certain assets for the payment of one creditor or class, and an action the purpose of which is the administration and distribution of assets equitably among the creditors. The rule is well settled that where one creditor in a receivership suit appeals instead of the receiver, and the estate is augmented by such appeal, the assets or fund thus secured do not go to the appealing creditor but must be equitably distributed in the receivership suit.

High on Receivers, sec. 819-c.

Schwartz v. Keystone Oil Co., 164 Pa. St. 415, 30 Atl. 297.

The same rule is followed under the national banking cases, one of which the trial court cites in its decision.

In Bailey v. Mosher, 93 Fed. 488, at page 491, the Court said:

> "The liability of the defendants, whatever it may be, for the acts complained of in the petition, *is an asset of the bank, belonging equally to all the creditors in proportion to their respective claims, and cannot be appropriated, in whole or in part, by a single creditor to the exclusive payment of his own claim.* It is the policy of the national banking act to secure the ratable distribution of the assets of an insolvent national bank among all its creditors. Assuming that the defendants are liable in damages for the acts complained of in the petition, they are liable at the suit of the receiver, who is the statutory assignee of the bank, and the proper party to institute all suits for the recovery of the assets of the bank, of whatever nature, to the end that they may be ratably distributed among its creditors. Rev. St. U. S., sec. 5234; Kennedy v. Gibson, 8 Wall. 498; Bank v. Colby, 21 Wall. 609; Hornor v. Henning, 93 U. S. 228; Stephens v. Oberstoltz, 43 Fed. 771; Bank v. Peters, 44 Fed. 13." (Our italics.)

And in Penn. S. Co. v. New York City Ry. Co., 198 Fed. 721, at 738, the Court says:

> "Equitable distribution must govern, and the underlying ones are these: The assets of an in-

> solvent corporation belong to its creditors. Although not, strictly speaking, a trust fund, they partake of the nature of one. *The administration of the estate is for their benefit. Its purpose is to make an equitable distribution. Equality is equity.* Debts and liabilities, present and future, certain and contingent, stand upon the same equitable basis." (Our italics.)

It will be noted that in this case there is a dictum to the effect that a general creditor's suit such as the one involved in the case at bar is merely an extension of a judgment creditor's suit, and this would apparently lead to the conclusion that the same sort of a lien is acquired by virtue of a general creditor's suit as that acquired in a judgment creditor's suit, but clearly such reasoning is fundamentally unsound. The idea of preference and priority which is absolutely inseparable from a judgment creditor's suit is diametrically opposed to the very purpose of a receivership suit such as the one at bar. A judgment creditor's suit is clearly in the nature of a levy in equity for the purpose of applying to the satisfaction of the claim of a creditor or class, certain property of the debtor. This equitable lien is given by the court of equity as a reward for diligence. As we have stated, in such a case the field is open and a preference and priority is the reward for vigilance and swiftness, but certainly a proceeding under the national bankruptcy act, or the national banking acts, or in a receivership suit such as the one at bar, cannot be said to be an extension of such a doctrine;

and of the three cases, most clearly in a receivership suit, wherein a receiver is appointed for the preservation of all rights and for the benefit of every party, the very basis for the jurisdiction of a court of equity and the principle upon which such a suit is based are fundamentally opposed to the idea of preference and priority. It is true that every lien and every right existing at the time of the appointment of the receiver and at the time the prize is taken into the Court is preserved, and that there is impressed upon all of the property in the custody of the Court such a trust as to entitle every party to have his rights and equities preserved, defended and enforced. The many cases heretofore cited, including many from the Supreme Court of the United States, absolutely preclude the application of the principle that one creditor, by virtue of the appointment of a receiver in a general creditor's suit, can acquire a preference and priority as against the other creditors.

In H. K. Porter Co. v. Boyd, 171 Fed. 305, a case coming up from Pennsylvania and following local law, giving the receiver the same rights as a levying creditor, the Court said:

> " * * * * From this it must be assumed that the receiver in this case represented the creditors in whose interest it was appointed, and was clothed with all the powers that creditors would have had in acting for themselves. * * * * The same principle applies *a fortiori* to a receiver deriving his authority, not at all from the debtor, but altogether from the Court acting in the interest and

for the enforcement of the rights of the creditors. When, therefore, on a creditor's bill a receiver is appointed for an insolvent corporation, he is not limited like an assignee for the benefit of creditors by the rights of the debtor corporation as to property held by it under a conditional sale, but has the rights of a levying creditor."

But, in this case, where under local law the creditors through their representative had a right to set aside a conditional sale, the assets were distributed pro rata and equitably among all the creditors.

"Plain justice requires that such a secret lien should be defeated in the former case; for not only does equity delight in equality, but the receivership bars creditors from pursuing the remedy, which otherwise would be open to them by way of attaching or levying on the personal chattels to defeat the lien. We perceive no force in the suggestion that to allow the receiver to defend against the establishment of the asserted lien would be to permit him to take sides as between different creditors or classes of creditors. *In such a case as the present, the rule of equity requires the pro rata division of the assets among the creditors,* subject to the allowance of costs and expenses and the adjustment and liquidation of priorities and preferences. Equality or a pro rata distribution of the assets among the creditors being the most equitable result obtainable, no liens or preferences should be recognized unless satisfactorily established; and it is not

only proper, but it is incumbent on the receiver to protect the funds or assets in his hands against all attempts of creditors to defeat equality of distribution, through the assertion of secret liens to which they are not entitled as against the liens of the general and unsecured creditors. Such a lien might be recognized and satisfied in whole or in part out of the special fund subject to it as between the original parties, in so far as such fund might be included in a surplus of assets left after the payment of all costs and expenses and other debts and claims; but only in that improbable event. But it is unnecessary to pursue this particular inquiry. In Printing Press Co. v. Pub. Co., 213 Pa. 207, 62 Atl. 841, the Supreme Court of Pennsylvania held that where on a creditor's bill a receiver was appointed for an insolvent corporation he was not limited to the rights of such corporation as to chattels held by it under a conditional sale but had the rights of a levying creditor."

We have heretofore discussed the local law in Pennsylvania.

In F. L. Smith Co. v. Orr, 224 Fed. 71, a case coming up from Missouri, the question arose as to whether the receiver appointed in a creditor's suit in Missouri had the right and power to void an unrecorded conditional sale, no decision or statute was found by the Court to be exactly in point, but by analogy the Court found that under the law of Missouri a receiver had such a right. The Court said:

> "The position of a receiver in a suit brought by a creditor against an insolvent debtor for the appointment of a receiver, the administration and sale of his property, and the distribution of its proceeds among his creditors is *more nearly analogous to that of an administrator of the estate of a deceased person* than that of an assignee for the benefit of creditors. He is appointed, his powers are conferred, and his duties are imposed by the Court and the law and not by the voluntary conveyance of the debtor. His primary duty is to hold, administer, convert into money, and distribute the proceeds of the property for the benefit of the creditors, for they have the larger, and generally the entire, pecuniary interest in it. He is appointed on the petition of a creditor for the benefit of the creditors, and is in fact their representative far more than he is the representative of the debtor."

That such is the law in Missouri was held in Henley v. Harmon, 103 Mo. App. 233.

The Court also found that a receiver was "armed with process" under the statute and decisions of Missouri to attack the unrecorded, conditional sale, quoting Thompson & Co. v. Massey, 76 Mo. App. 197, wherein it was held that under the statute the term "creditors" meant only such as should seek to enforce their claims through the machinery of the law, saying that under legal process the creditors seek to appropriate their debtor's effects in *invitum* as to him, whereas if they claim only under a conveyance from

him, the right to assert a higher title than he possessed depends wholly upon the nature of the consideration. This merely shows that under the local law and decisions such receiver had a right to avoid the conditional sale, but the assets so acquired were distributed equitably and ratably among the creditors.

It will be noted that in the cases above cited (H. K. Porter v. Boyd and F. L. Smith v. Orr) there are also dicta which would apparently support the theory that a receiver, by virtue of his appointment, acquires a right to avoid conveyances and encumbrances which the creditors represented by him could not have avoided at the time of the appointment of the receiver. We have already discussed the confusion between a judgment creditor's suit and a general creditor's suit, and that the idea of preference and priority given to one interest in a receivership suit by virtue of the appointment of a receiver is not only fundamentally unsound but has been repudiated by the great weight of authority, including the Supreme Court of the United States.

Probably no Court has so clearly announced the rule in a case analogous to the one at bar as the Supreme Court of Washington in the case of Tompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741. In that case the trustee sought to foreclose a mortgage. The Court had adjudged the corporation insolvent and brought the whole of its property into court by the appointment of a receiver. The question arose as to whether the lien of the trustee was not void

under the local law as a preference as against creditors. The Court, referring to the local statute as to insolvency, says:

> "*The purpose in thus placing insolvent corporations in the possession of the Courts can only be that their assets may be distributed ratably to creditors.* A general assignment without preferences does not defeat this purpose, but if the estate of a corporation comes into the Court or into the hands of an assignee burdened with preferences, there is an end of equal distribution and the object of the law is defeated."

In that case the preference was invalid as against general creditors and the lower Court had allowed several of them to intervene in the foreclosure suit and had held that the mortgage was void, and directed the Receiver to sell the property, and after paying the costs of the receivership, to pay in full the judgments of the intervenors and the balance, if any, to the appellant (the Trustee).

This is exactly what was done by the Trial Court in the case at bar. In neither of these cases had the intervenors acquired a lien. In the Washington case, however, they had a right to contest the mortgage as general creditors. The Supreme Court, however, held that it was error to allow them to intervene on the ground that they had no such lien as to entitle them to intervene under the statute of Washington, which is similar to that of the State of Idaho, and reversed the Trial Court's decision, on the ground that the assets must be distributed ratably, saying:

"We cannot approve this disposition for several reasons: At the time when the Smiths filed their intervention the Court had already adjudged the corporation to be an insolvent and brought the whole of its property into the Court by the appointment of a receiver. * * * The receiver having been thus appointed, *represented the corporation and all of its creditors.* He was a trustee for both. It was his duty under the orders of the Court to take proof of all claims presented to him; to recommend the allowance of those which he deemed just and the disallowance of those as were improper. It was not necessary that any claim thus presented should be in the form of a judgment, or that there should be technical interventions. If claims were disputed by the receiver, the Court had full power to decide the points at issue, calling in a jury if necessary. Any creditor, having proved his claim, would have the right to contest the claim of any other creditor, if the receiver should fail or refuse to do so in a proper case. In a word, this was a fund in Court, the beneficiaries of which should receive their respective shares as expeditiously as the nature of the property would permit, and the principles governing the proceedings are substantially those enacted into statutes of insolvency in the states and into bankruptcy acts by the United States. It was just as much the duty of the receiver in this case to oppose the appellant's mortgage as though he had been an assignee in bank-

ruptcy or insolvency; for, although the corporation could not dispute it, he was the trustee for other creditors who could, and *it was his duty to act in their interest, to the end that all creditors should share alike. Both parties seem to have overlooked all these matters, and have proceeded as though they could expect to be paid in full, leaving other creditors nothing,* there being, as appears in the case, a number of creditors who did not intervene. But the race is not to the swift alone, when the prize is in a court of equity for equal distribution." (Our italics.)

And so in this case. The creditors who intervened in the foreclosure suit endeavored to obtain payment in full out of the assets of the Power Company for the equitable distribution of which the Receiver had been appointed.

It will be noted that in the Washington case the Court also held that although an illegal preference was attempted by one of the creditors, he was nevertheless entitled to share equally with other creditors in a fund in the hands of the Receiver.

It is equally well established that the Trustee in the case at bar has a right to share in the general assets of the Power Company at least to the extent of its deficiency. In Mercantile Trust Co. v. Southern States Land & Timber Co., 86 Fed. 711, 722, the Court said:

"Touching the third question, it is to be observed that, under the 92nd and the 8th of the equity rules, the complainants in this case will

be entitled to a decree for any balance that may be found to be due them, 'over and above the proceeds of sales' of the property on which their mortgage has been foreclosed, and to have execution issue thereon in the form used in the Circuit Court in suits at common law in actions of assumpsit. Therefore, as to any unsatisfied balance that may remain due the complainants, after the appropriation to their demand of the proceeds of the property upon which they have foreclosed their mortgage, they are on a par with other general creditors who are or may become parties to this proceeding. Such fund, then, as shall be ascertained to exist free from the lien of the complainants' mortgage or other lien that may be found to have existed at the institution of the suit, must be divided pro rata among all the creditors who establish their claims, including the complainants, to the extent of the balance of their debt, if any, remaining unsatisfied after the appropriation thereto of the proceeds of the mortgaged property."

And the trial court itself so held in the case of Westinghouse v. Idaho Ry., Light & Power Co., 228 Fed. 972.

In conclusion, we submit that the action of the trial court in permitting general creditors to intervene in the foreclosure suit for the purpose of contesting the lien of appellant's mortgage is clearly contrary to the laws of the State of Idaho as construed by its highest court; and in so far as the de-

cision holds that general creditors, who have invoked the aid and jurisdiction of the Court in the Receivership suit, have acquired in such Receivership suit or by virtue of the appointment of the Receiver rights superior to the Receiver and preferences over other general creditors having equally meritorious claims, the decision comes well within the decision of this Court in Clark v. Bacorn, 116 Fed. 617, where it is said: "It would indeed seem anomalous that a lien adverse to the rights of the receiver could be obtained and thus interfere with one of the objects of his appointment in the control of the distribution of the assets." The decision seems contrary alike to the principles of equity and the decisions of this Court and of the Supreme Court of the United States and, we believe, of every Court where the question has arisen under statutes similar to those of the State of Idaho.

The decree, therefore, should be modified so as to provide that what is therein designated as the "Unsecured Creditors' Fund" should be paid to the appellant, The Equitable Trust Company of New York, to be paid out and distributed as is therein provided relative to the other proceeds from the sale of the mortgaged property; and if for any reason such course should seem improper under the circumstances, such "Unsecured Creditors' Fund" should be ordered paid to the Receiver for equitable distribution among all the creditors.

Respectfully submitted,

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